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AND IN

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1893.—VOL. III.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, AND 14, CHARING CROSS
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

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Page	*For*	*Read*
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GENERAL SECRETARIAT LIBRARY

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In the First Series,
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[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Akeroyd, Roberts *v.* *In re* Akeroyd's Settlement (C.A.) 363
Akeroyd's Settlement, *In re.* Roberts *v.* Akeroyd (C.A.) 363
Allan, Manitoba and North-West Land Corporation *v.* – – 432
Answorth, Palmer *v.* *In re* Palmer – – (C.A.) 369
Anthony, *In re.* Anthony *v.* Anthony – – – – 498
——— *v.* Anthony. *In re* Anthony – – – – 498
Armitage, *In re.* Armitage *v.* Garnett – – (C.A.) 337
——— *v.* Garnett. *In re* Armitage – – (C.A.) 337
Attorney-General *v.* Hatch (C.A.) 36
——— *v.* Hooper – 483
——— *v.* St. John's Hospital, Bath – – – 151

B.

PAGE

Bagot, *In re.* Paton *v.* Ormerod (C.A.) 348
Bartlett *v.* West Metropolitan Tramways Company – – 437
Beaumont, *In re* – – – 490
Bowen *v.* Churchill. *In re* Daveron – – – – 421
Bradford and District Tramways Company, *Ex parte* – – 463
Bristol's (Marquis of) Settled Estates, *In re* – – – 161
Brocklesby *v.* Temperance Permanent Building Society (C.A.) 130
Brooks, Folkestone (Mayor of) *v.* – – – (C.A.) 22
Brown, Sheward *v.* *In re* Sheward – – – – 502

C.

Campbell, *In re.* Campbell *v.* Campbell – – – – 468

PAGE

Campbell *v.* Campbell. *In re* Campbell – – – – 468
Churchill, Bowen *v.* *In re* Daveron – – – – 421
Cleveland's (Duke of) Settled Estates, *In re* – (C.A.) 244
Coles *v.* Peyton. *In re* Sir J. J. Ennis – – (C.A.) 238
Crow, Oxford (Mayor, Aldermen, and Citizens of) *v.* – – 535

D.

Daveron, *In re.* Bowen *v.* Churchill – – – – 421
Dowling, Hunter *v.* (C.A.) 212

E.

Eddystone Marine Insurance Company, *In re* – (C.A.) 9
Edmunds, Goodier *v.* – – 455
English, Scottish, and Australian Chartered Bank, *In re* (C.A.) 385
Ennis (Sir J. J.), *In re.* Coles *v.* Peyton – – (C.A.) 238

F.

Fairbairn Engineering Company, *In re.* Ladd's Case – 450
Folkestone (Mayor of) *v.* Brooks (C.A.) 22
——————— *v.* Ladd (C.A.) 22
Foster *v.* Fraser – – – 158
Fraser, Foster *v.* – – – 158

G.

Garnett, Armitage *v.* *In re* Armitage – – (C.A.) 337
Gerard's (Lord) Settled Estate, *In re* – – – (C.A.) 252
Goodier *v.* Edmunds – – 455
Greenhill *v.* North British and Mercantile Insurance Company – – – – 474
Gregson, *In re* – (C.A.) 232

H.

PAGE

Hatch, Attorney-General *v.* (C.A.) 36
Haynes *v.* King – – – 439
Head, *In re.* Head *v.* Head – 426
——— *v.* Head. *In re* Head – 426
Heard, Thorne *v.* – – – 530
Hetling and Merton's Contract, *In re* – – – (C.A.) 269
Heyhoe, Scales *v.* *In re* Richerson (No. 2) – – – 146
Hooper, Attorney-General *v.* – 483
Humphreys, *In re.* Humphreys *v.* Levett – (C.A.) 1
——————— *v.* Levett. *In re* Humphreys – (C.A.) 1
Hunter *v.* Dowling – (C.A.) 212

I.

Inman, *In re.* Inman *v.* Rolls – 518
——— *v.* Rolls. *In re* Inman – 518

K.

King, Haynes *v.* – – – 439

L.

Ladd, Folkestone (Mayor of) *v.* (C.A.) 22
Ladd's Case. *In re* Fairbairn Engineering Company – 450
Levett, Humphreys *v.* *In re* Humphreys – (C.A.) 1
London Chartered Bank of Australia, *In re* – – – 540

M.

Manitoba and North-West Land Corporation *v.* Allan – – 432
Maple & Co., Wheaton *v.* (C.A.) 48
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt – – (C.A.) 122
Merton and Hetling's Contract, *In re* – – – (C.A.) 269
Methley School Board, Richardson *v.* – – – – 510
Midgley *v.* Midgley – (C.A.) 282
Milbank *v.* Vane – (C.A.) 79

PAGE

Millard's Settled Estates, *In re* (C.A.) 116
Morgan, *In re*. Morgan *v*. Morgan – – – (C.A.) 222
——— *v*. Morgan. *In re* Morgan – – – (C.A.) 222
Mostyn *v*. Mostyn – (C.A.) 376

N.

Nordenfelt, Maxim Nordenfelt Guns and Ammunition Company *v*. – – (C.A.) 122
North British and Mercantile Insurance Company, Greenhill *v*. – – – – 474

O.

Ormerod, Paton *v*. *In re* Bagot (C.A.) 348
Overell, Tidd *v*. *In re* Tidd – 154
Oxford (Mayor, Aldermen, and Citizens of) *v*. Crow – – 535

P.

Palmer, *In re*. Palmer *v*. Answorth – – (C.A.) 369
——— *v*. Answorth. *In re* Palmer – – – (C.A.) 369
Paton *v*. Ormerod. *In re* Bagot (C.A.) 348
Peake's Settled Estates, *In re* – 430
Peyton, Coles *v*. *In re* Sir J. J. Ennis – – (C.A.) 238
Plenderleith (a person of unsound mind not so found by Inquisition), *In re* (C.A.) 332
Portsea Island Building Society, *In re* – – – – – 205

R.

Richardson *v*. Methley School Board – – – – 510
Richerson, *In re*. Scales *v*. Heyhoe (No. 2) – – – 146
Roberts *v*. Akeroyd. *In re* Akeroyd's Settlement (C.A.) 363
Rolls, Inman *v*. *In re* Inman – 518

S.

St. John's Hospital, Bath, Attorney-General *v*. – – 151
Scales *v*. Heyhoe. *In re* Richerson (No. 2) – – – 146
Sheward, *In re*. Sheward *v*. Brown – – – – 502
——— *v*. Brown. *In re* Sheward – – – – 502
Shropshire Railways Company, Webb *v*. – – (C.A.) 307
Staffordshire Gas and Coke Company, *In re* – – – 523
Sudbury and Poynton Estates, *In re*. Vernon *v*. Vernon – 74
Sutherland (Dowager Duchess of) *v*. Sutherland (Duke of) – 169

T.

Temperance Permanent Building Society, Brocklesby *v*. (C.A.) 130
Thorne *v*. Heard – – – 530
——— *v*. Thorne – – – 196
Tidd, *In re*. Tidd *v*. Overell – 154
——— *v*. Overell. *In re* Tidd – 154

V.

Vane, Milbank *v*. – (C. A.) 79
Vernon *v*. Vernon. *In re* Sudbury and Poynton Estates – 74

W.

Washington Diamond Mining Company, *In re* – (C.A.) 95
Webb *v*. Shropshire Railways Company – – (C.A.) 307
West Metropolitan Tramways Company, Bartlett *v*. – – 437
Wheaton *v*. Maple & Co. (C.A.) 48

CENTRAL SECRETARIAT LIBRARY

TABLE OF CASES CITED.

A.

		PAGE
Adamson's Case	Law Rep. 18 Eq. 670	99
Addlestone Linoleum Company, In re	37 Ch. D. 191	15
Ailesbury's (Marquis of) Settled Estates, In re	[1892] 1 Ch. 506; [1892] A. C. 356	189
Alabama, New Orleans, Texas, and Pacific Junction Railway Company, In re	[1891] 1 Ch. 213	385, 544
Almada and Tirito Company, In re	38 Ch. D. 415	16
Anderson's Case	7 Ch. D. 75	15
Andrew *v.* Swansea Cambrian Benefit Building Society	50 L. J. (C.P.) 428; 44 L. T. (N.S.) 106	207
Anglo-Danubian Steam Navigation and Colliery Company, In re	Law Rep. 20 Eq. 339	326
Armstrong *v.* Eldridge	3 Bro. C. C. 215	750
Arnold *v.* Cheque Bank	1 C. P. D. 578	136
——— *v.* Woodhams	Law Rep. 16 Eq. 29	479
Ashton *v.* M'Dougall	5 Beav. 56	480
Aslatt *v.* Southampton (Corporation of)	16 Ch. D. 143	511
Atkinson *v.* Bradford Third Equitable Benefit Building Society	25 Q. B. 377	155
Attorney-General *v.* Ailesbury (Marquis of)	12 App. Cas. 672	247
——— *v.* Chesterfield (Earl of)	18 Beav. 596	292
——— *v.* Johnstone	Amb. 577	351

B.

Baldwin *v.* Church	Cited 1 Str. 20	295
Ball, In re	2 Mol. 145	334
Ballance, In re	42 Ch. D. 62	371
Banner *v.* Berridge	18 Ch. D. 254	155
Barker's Estate, In re	15 Ch. D. 635	371
Barnes *v.* Addy	Law Rep. 9 Ch. 244	285
Barrow *v.* Barrow	4 K. & J. 409	474
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	136
Bass *v.* Gregory	25 Q. B. D. 481	51
Baxendale *v.* Bennett	3 Q. B. D. 525	136
Bayley *v.* Wilkinson	16 C. B. (N.S.) 161	26
Beeching *v.* Morphew	8 Hare, 129	284
Beggan *v.* M'Donald	2 L. R. Ir. 560	60
Bellamy and Metropolitan Board of Works, In re	24 Ch. D. 387	271
Bent *v.* Cullen	Law Rep. 6 Ch. 235	222
Bernard *v.* Minshull	Joh. 276	351
Berridge *v.* Ward	10 C. B. (N.S.) 400	446

		PAGE
Bevan *v.* Habgood	1 J. & H. 222	186
Bilborough *v.* Holmes	5 Ch. D. 255	428
Blachford, In re	27 Ch. D. 676	473
Black & Co.'s Case	Law Rep. 8 Ch. 254	99
Blewitt *v.* Roberts	Cr. & Ph. 274	225
Blight *v.* Hartnoll	19 Ch. D. 294	224
—— *v.* ——	23 Ch. D. 218	351
Blundell, In re	40 Ch. D. 370	285
——, In re	44 Ch. D. 1	524
Bolton Partners *v.* Lambert	41 Ch. D. 295	537
Bouch *v.* Sproule	12 App. Cas. 385	343
Bowes *v.* Law	Law Rep. 9 Eq. 636	159
Bradford Tramways Company, In re	4 Ch. D. 18	465
Bridgewater Navigation Company, In re	[1891] 2 Ch. 317	342, 344
Briggs *v.* Jones	Law Rep. 10 Eq. 92	133
Bright *v.* Walker	1 C. M. & R. 211	48, 60
Britain *v.* Rossiter	11 Q. B D. 123	514
British Seamless Paper Box Company, In re	17 Ch. D. 467	16
Brown *v.* Lynch	2 Bradf. Surrogate Rep. (N.Y.) 214	494
Bruce (Lord Henry) *v.* Ailesbury (Marquis of)	[1892] A. C. 356	189
Buckley's Trusts, In re	22 Ch. D. 583	5
Burdick *v.* Garrick	Law Rep. 5 Ch. 233	155
Burn *v.* Carvalho	4 My. & Cr. 690	507
Butcher *v.* Stead	Law Rep. 7 H. L. 439	114

C.

Cahill *v.* Cahill	8 App. Cas. 420	478
Cambridge *v.* Rous	8 Ves. 12	351
Campbell's Case	4 Ch. D. 470	308
Cannon, Ex parte	30 Ch. D. 629	98
Cardigan (Earl of) *v.* Montague	Sugden on Powers, 8th Ed. App. p. 918	186
Chaffe *v.* Kelland	1 Roll. Abr. 929	294
Chandler *v.* Pocock	15 Ch. D. 491	244
Chawner's Settled Estates, In re	[1892] 2 Ch. 192	181
Cheetham *v.* Manchester (Mayor of)	Law Rep. 10 C. P. 249	486
Child *v.* Douglas	5 D. M. & G. 739	159
Circuitt *v.* Perry	23 Beav. 275	348
Clibborn *v.* Clibborn	9 Ir. Jur. 381	348
Clive *v.* Carew	1 J. & H. 199	479
Codrington *v.* Lindsay	Law Rep. 8 Ch. 578	479
Cooke *v.* Ipswich Local Board of Health	Law Rep. 6 Q. B. 451	26
Coombs *v.* Coombs	Law Rep. 1 P. & M. 288	296
Coope *v.* Twynam	T. & R. 426	242
Cooper, In re	20 Ch. D. 611	136
—— and Allen's Contract, In re	4 Ch. D. 802	186
—— *v.* Wandsworth District Board of Works	14 C. B. (N.S.) 180	484
Cope *v.* De La Warr (Earl)	Law Rep. 8 Ch. 982	83
Cotton's Trustees and the School Board for London, In re	19 Ch. D. 624	458
Crawshaw *v.* Crawshaw	14 Ch. D. 817	371
Craythorne *v.* Swinburne	14 Ves. 160	242
Cresswell *v.* Cheslyn	2 Eden, 123; 3 Bro. P. C. 246	371

		PAGE
Cresswell *v.* Parker	11 Ch. D. 601	435
Cross *v.* Lewis	2 B. & C. 686	63
Cruikshank *v.* Duffin	Law Rep. 13 Eq. 555	201
Curtius *v.* Caledonian Fire and Life Insurance Company	19 Ch. D. 534	149

D.

Dale and Plant, In re	43 Ch. D. 255	98
Dalison's Settled Estate, In re	[1892] 3 Ch. 522	161
Dalton *v.* Angus	6 App. Cas. 740; 3 Q. B. D. 85	51
Daniel *v.* Anderson	31 L. J. (Ch.) 610	60
—— *v.* North	11 East, 372	52
Davers *v.* Dewes	3 P. Wms. 40	356
Dawe's Case	Law Rep. 6 Eq. 232	452
Day *v.* Woolwich Equitable Building Society	40 Ch. D. 491	275
Dering *v.* Winchelsea (Earl of)	1 Cox, 318	242
Descrambes *v.* Tomkins	1 Cox, 133	519
De Teissier's Settled Estates, In re	[1893] 1 Ch. 153	255
Dewdney, Ex parte	15 Ves. 479	293
Dickson, In re	29 Ch. D. 331	6, 519
Doe *v.* Bettison	12 East, 305	185
—— *v.* Gilbert	5 Q. B. 423	181
—— *v.* Mabberley	6 Car. & P. 126	200
—— *v.* Pyke	5 M. & S. 146	62
—— *v.* Scarborough (Earl of)	3 A. & E. 2, 397	83
—— *v.* Stephens	6 Q. B. 208	183
—— *v.* Thomas	1 Man. & G. 335	357
Dominion of Canada Plumbago Company, In re	27 Ch. D. 33	524
Drake *v.* Trefusis	Law Rep. 10 Ch. 364	255
Dronfield Silkstone Coal Company, In re	23 Ch. D. 511	524
Dugdale, In re	38 Ch. D. 176	87
Dundas *v.* Wolfe Murray	1 H. & M. 425	519
Dyas *v.* Cruise	2 J. & Lat. 460	187

E.

Easum *v.* Appleford	5 My. & Cr. 56	357
Else *v.* Else	Law Rep. 13 Eq. 196	379
Empress Engineering Company, In re	16 Ch. D. 125	538
English, Scottish, and Australian Chartered Bank, In re	[1893] 3 Ch. 385	544
Everett *v.* Remington	[1892] 3 Ch. 148	447

F.

Fahey *v.* Dwyer	4 L. R. Ir. 271	60
Falle *v.* Godfray	14 App. Cas. 70	357
Farrar *v.* Cooper	44 Ch. D. 323	513
Festing *v.* Allen	5 Hare, 573	519
Foley *v.* Hill	2 H. L. C. 28	155
Folkestone (Corporation of) *v.* Woodward	Law Rep. 15 Eq. 159	39
Frewen *v.* Philipps	11 C. B. (N.S.) 449	60, 445
Fry *v.* Tapson	28 Ch. D. 268	278

G.

		PAGE
Gardner v. London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	437
Gas Light and Coke Company v. Towse	35 Ch. D. 519	185
Gaslight Improvement Company v. Terrell	Law Rep. 10 Eq. 168	98
Gaston v. Frankum	2 De G. & Sm. 561; 16 Jur. 507	185
General Steam Navigation Company v. Guillou	11 M. & W. 877	296
George, In re	5 Ch. D. 837	519
Gibbs v. Guild	9 Q. B. D. 59	533
Gill's Case	12 Ch. D. 755	112
Godard v. Gray	Law Rep. 6 Q. B. 139	296
Goldstraw v. Duckworth	5 Q. B. D. 275	486
Goodier v. Edmunds	[1893] 3 Ch. 455	422
——— v. Johnson	18 Ch. D. 441	455
Goodman v. Saltash (Mayor of)	7 App. Cas. 633	51
Goodtitle v. Baldwin	11 East, 488	51
Gorringe v. Irwell India Rubber and Gutta Percha Works	34 Ch. D. 128	506
Greathead v. Bromley	7 T. R. 455	295
Greaves' Settlement Trusts, In re	23 Ch. D. 313	247
Griffith, Ex parte	23 Ch. D 89	111
Grissell, Ex parte	3 Ch. D. 411	525
Grissell's Case	Law Rep. 1 Ch. 528	111
Guidot v. Guidot	3 Atk. 254	250

H.

Hale v. Pew	25 Beav. 335	458
Hall Dare's Contract, In re	21 Ch. D. 41	379
Hall v. Lietch	Law Rep. 9 Eq. 376	350
Hallett's Estate, In re	13 Ch. D. 696	371
Hampden v. Buckinghamshire (Earl of)	37 Sol. J. 455; [1893] 2 Ch. 531	181
Hanslip v. Kitton	1 D. J. & S. 440	125
Harbidge v. Warwick	3 Ex. 552	71
Hardy v. Caley	33 Beav. 365	296
Harris v. De Pinna	33 Ch. D. 238	52, 159
——— v. Farwell	15 Beav. 31	427
——— v. Harris	35 W. R. 710	285
——— v. ———	Ir. R. 3 Eq. 610	348
Hastings (Lady), In re	35 Ch. D. 94	186
Hawks v. Longridge	29 L. T. (N.S.) 449	348
Heasman v. Pearse	Law Rep. 7 Ch. 275	462
Heath v. Perry	3 Atk. 101	519
——— v. Pugh	6 Q. B. D. 345	478
Hedges v. Harpur	3 De G. & J. 129	225
Henderson v. Bank of Australasia	40 Ch. D. 170	16
Herbert v. Pigott	2 Cr. & M. 384	285
Hibbert v. Acton Local Board	5 Times L. R. 274	159
Hill, Ex parte	23 Ch. D. 695	106
——— v. Edmonds	5 De G. & Sm. 603	478
——— v. Rattey	2 J. & H. 634	224
——— v. Walker	4 K. & J. 166	297
Hindmarsh, In re	1 Dr. & Sm. 129	155

		PAGE
Holgate v. Jennings	37 Sol. J. 303	371
Home Investment Society, In re	14 Ch. D. 167	524
Homer v. Homer	8 Ch. D. 758	251
Hope v. Croydon and Norwood Tramways Company	34 Ch. D. 731	438
Hopkins v. Smethwick Local Board of Health	24 Q. B. D. 712	486
Horne v. Pountain	23 Q. B. D. 264	334
Hornsey Local Board v. Monarch Investment Building Society	24 Q. B. D. 1	29
Hosking v. Smith	13 App. Cas 582	201
Hotchkin's Settled Estates, In re	35 Ch. D. 41	118
Houghton Estate, In re	30 Ch. D. 102	118, 252
Howard's Settled Estates, In re	[1892] 2 Ch. 233	164
Howe v. Dartmouth (Earl of)	7 Ves. 137	315
Hull, Barnsley and West Riding Junction Railway Company, In re	W. N. (1893) 83	465
Humble v. Shore	7 Hare, 247; 1 H & M. 550	369, 372
Hurst v. Hurst	21 Ch. D. 278	506
Hutcheson v. Mannington	1 Ves. 366	473
Hyett v. Mekin	25 Ch. D. 735	462

I.

Indigo Company v. Ogilvy	[1891] 2 Ch. 31	435
Ingham, In re	[1893] 1 Ch. 352	284

J.

Jacobs, In re	Law Rep 10 Ch. 211	547
James v. Wyvill	51 L. T. (N.S.) 237	38
Jeffery, In re	[1891] 1 Ch. 671	4
Jenkinson v. Harcourt	Kay, 688	498
Johnson's Settlement, In re	Law Rep. 8 Eq. 348	255
Johnston v. Renton	Law Rep. 9 Eq. 181	166
Johnstone v. Beattie	10 Cl. & F. 42	492
Joliffe's Trusts, In re	W. N. (1893) 84	236
Jones v. Westcomb	1 Eq. C. Ab. 245	365
Judkin's Trusts, In re	25 Ch. D. 743	519

K.

Kelner v. Baxter	Law Rep. 2 C. P. 174	538
Kent's Case	39 Ch. D. 259	108
Kidderminster (Mayor of) v. Hardwick	Law Rep. 9 Ex. 13	535
Kidman v. Kidman	40 L. J. (Ch.) 359	519
King v. Hoare	13 M. & W. 494	295
Knox v. Mackinnon	13 App. Cas. 753	470

L.

Leake v. Robinson	2 Mer. 363	351
Leavesley, In re	[1891] 2 Ch. 1	334
Lee v. Lee	4 Ch. D. 175	478
—— v. Sankey	Law Rep. 15 Eq. 204	285

		PAGE
Lepard *v.* Vernon	2 V. & B. 51.	284
Lett *v.* Randall	2 D. F. & J. 388	225
Lewis *v.* Duncombe	20 Beav. 398.	500
——— *v.* Weston-super-Mare Local Board	40 Ch. D. 55.	486
Lightfoot *v.* Burstall	1 H. & M. 546	370
London and Blackwall Railway Company *v.* Cross	31 Ch. D. 354	513
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	460
London and Suburban Bank, In re	[1892] 1 Ch. 604	206
London Celluloid Company, In re	39 Ch. D. 190	15
Lowestoft, Yarmouth, and Southwold Tramways Company, In re	6 Ch. D. 484	465
Lubbock *v.* British Bank of South America	[1892] 2 Ch. 198	344
Lush's Trusts, In re	Law Rep. 4 Ch. 591	479
Lytton's Settled Estates, In re	W. N. (1884) 193	255

M.

M'Culloch *v.* Dawes	9 D. & R. 40	297
Mainland *v.* Upjohn	41 Ch. D. 126	326
Mallack *v.* Galton	3 P. Wms. 352	478
Manners (Lord) *v.* Johnson	1 Ch D. 673	159
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	525
Markham *v.* Ivatt	20 Beav. 572.	351
Marsden's Trust, In re	28 L. J. (Ch.) 906	187
Marshfield, In re	34 Ch. D. 721	293
Martineau *v.* Briggs	28 W. R. 889; 45 L. J. (Ch.) 674	251
Mason, Gallagher and Slater's Case	30 W. R. 378	99
Master *v.* Hansard	4 Ch. D. 718.	159
Masters *v.* Pontypool Local Government Board	9 Ch. D. 677.	486
Maw *v.* Pearson	28 Beav. 196.	292
Medlock, In re.	55 L. J. (Ch.) 738	519
Meek *v.* Devenish	6 Ch. D. 566.	423
Merchants of the Staple of England *v.* Bank of England	21 Q. B. D. 160	136
Micklethwait *v.* Newlay Bridge Company	33 Ch. D. 133	446
Midland Railway Company *v.* Watton	17 Q. B. D. 30	29
Millard's Settled Estates, In re	[1893] 3 Ch. 116	163
Miller *v.* Dell	[1891] 1 Q. B. 468	155
Mitchell *v.* Cantrill	37 Ch. D. 56	60, 440
Moore *v.* Rawson	3 B. & C. 332	63
Morgan, In re	18 Ch. D. 93	200
Murray *v.* Clayton	Law Rep. 15 Eq. 115.	125

N.

New Zealand Trust and Loan Company, In re	[1893] 1 Ch. 403	233
Newhaven Local Board *v.* Newhaven School Board	30 Ch. D. 350	39
Newington *v.* Levy	Law Rep. 6 C. P. 120	295
Newis *v.* Lark	Plowd. 403	87

		PAGE
Newman v. Anderton	2 Bos. & P. (N. R.) 224	186
Norfolk (Duke of) v. Arbuthnot	5 C. P. D. 390	69
North London Railway Company v. Great Northern Railway Company	11 Q. B. D. 30	511
Northern Counties of England Fire Insurance Company v. Whipp	26 Ch. D. 482	133
Northumberland Avenue Hotel Company, In re	33 Ch. D. 16	538

O.

Oldham v. Oldham	Law Rep. 3 Eq. 404	506
Oorogum Gold Mining Company of India v. Roper	[1892] A. C. 125	15, 316
Oriental Hotel Company, In re	Law Rep. 12 Eq. 126.	525
Ormrod's Settled Estate, In re	[1892] 2 Ch 318	76, 167
Owen, Re	36 Sol. J. 539	371
Oxenden v. Falmouth (Lord)	Sug. V. & P. 14th Ed. p. 637.	278

P.

Pearce v. Edmeades	3 Y. & C. Ex. 246	150
Pelton Brothers v. Harrison	[1891] 2 Q. B. 422	184
Perry v. Eames	[1891] 1 Ch. 658	48
Perry-Herrick v. Attwood	2 De G. & J. 21; 25 Beav. 205	133, 136
Peters v. Lewes and East Grinstead Railway Company	18 Ch. D. 429	461
Petty v. Cooke.	Law Rep. 6 Q. B. 790	296
Pettyt v. Janeson	6 Madd. 146.	212
Phillips v. Ward	2 H. & C. 717; 33 L. J. (Ex.) 7	295
Pickersgill v. Rodger	5 Ch. D. 163	500
Piggott v. Stratton	1 D, F & J. 33	58
Pike v. Fitzgibbon	17 Ch. D. 454	184
Pink, In re	23 Ch. 577	335
Plaskynaston Tube Company, In re	23 Ch. D. 542	16
Pocock v. Gilham	1 Cab. & El. 104	159
Poole, Jackson, and Whyte's Case.	9 Ch. D. 322.	99
Porter, In re	[1892] 3 Ch. 491	506
Portuguese Consolidated Copper Mines, In re	45 Ch. D. 16.	537
Potinger v. Wightman	3 Mer. 67	490
Pott v. Clegg	16 M. & W. 321	155
Potter, In re	3 Times L R. 420	423
Poulson v. Wellington	2 P. Wms. 533	350
Pountain, In re.	37 Ch. D. 609	335

R.

Radcliffe, In re.	7 Ch. D. 733	285
Real Estates Company, In re	[1893] 1 Ch. 398	206
Reg. v. Turmine	4 Q. B. D. 79.	513
Rein v. Stein	[1892] 1 Q. B. 753	435
Renals v. Cowlishaw	9 Ch. D. 125.	447
Rew v. Pettet	1 A & E. 196	533
Rhoades, In re	29 Ch. D. 142	371

		PAGE
Robinson *v.* Robinson	1 D. M. & G. 247	471
——— *v.* Wheelwright	6 D. M. & G. 535	479
Robson *v.* Edwards	[1893] 2 Ch. 146	60
Rodick *v.* Gandell	1 D. M. & G. 763	507
Roe *v.* Ireland	11 East, 280	51
Roper *v.* Halifax	8 Taunt. 845	83
Round *v.* Turner	W. N. (1889) 38	118
Rownson, In re	29 Ch. D. 358	285
Ryall *v.* Kennedy	40 New York (Sup. Ct.) 347	492

S.

Sackville-West *v.* Holmesdale (Viscount)	Law Rep. 4 H. L. 543	83
St. Alban's, Wood Street (Rector and Churchwardens of), In re	66 L. T. (N.S.) 51	153
St. James and St. John, Clerkenwell (Vestry of) *v.* Feany	24 Q. B. D. 703	484
Salmon *v.* Matthews	8 M. & W. 827	183
Sandgate District Local Board of Health *v.* Keene	[1892] 1 Q. B. 831	22
Sandys, Ex parte	42 Ch. D. 98	15
Savage *v.* Foster	9 Mod. 35	478
Savage's Trust, In re	50 L. J. (Ch.) 131	371
Scale *v.* Rawlins	[1892] A. C. 342	351
Scholey *v.* Walton	12 M. & W. 510	284
Seaton *v.* Seaton	13 App. Cas. 61	474
Sherwin *v.* Shakspear	5 D. M. & G. 517	272
Simper *v.* Foley	2 J. & H. 555	51
Sitwell *v.* Bernard	6 Ves. 520	471
Slaughter *v.* Sunderland (Mayor of)	65 L. T. (N.S.) 250	159
Smith *v.* Everett	27 Beav. 446	285
——— *v.* Lucas	18 Ch. D. 531	480
Sneesby *v.* Thorne	7 D. M. & G. 399	284
Société Générale de Paris *v.* Dreyfus	37 Ch. D. 215	435
Spargo's Case	Law Rep. 8 Ch. 407	107
Speer's Trusts, In re	3 Ch. D. 262	255
Spencer, In re	51 L. J. (Ch.) 271	285
Spicer *v.* Martin	14 App Cas. 12	447
Spread *v.* Morgan	11 H. L. C. 588	423
Stahlschmidt *v.* Lett	1 Sm. & Giff. 415	206
Stamford *v.* Stamford	34 Ch. D. 362	365
Stamford's (Lord) Settled Estates, In re	43 Ch. D. 84	256
Stanley *v.* Stanley	7 Ch. D. 589	479
Stannard *v.* St. Giles, Camberwell (Vestry of)	20 Ch. D 190	513
Steel *v.* Dixon	17 Ch. D. 825	242
Stevens *v.* Gourley	7 C. B. (N.S.) 99	159
Stevenson *v.* Liverpool (Mayor of)	Law Rep. 10 Q. B. 81	200
Stokes *v.* Heron	12 Cl. & F. 161	224
Streatfield *v.* Streatfield	1 W. & T. L. C. Eq. 6th Ed. p. 397	500
Sunderland Universal Building Society, In re	21 Q. B. D. 349	209
Swan *v.* North British Australasian Company	2 H. & C. 175	136
Swire *v.* Francis	3 App. Cas. 106	136
Sykes *v.* Sykes	Law Rep. 3 Ch. 301	371
Sykes' Case	Law Rep. 13 Eq. 255	107

T.

		PAGE
Tanqueray-Willaume and Landau, In re	20 Ch. D. 465	201
Tapling v. Jones	11 H. L. C. 290	70
Taylor v. Horde	1 Burr. 60	186
Thatcher's Trusts, In re	26 Ch. D. 426	6
Thomas v. Griffith	2 D. F. & J. 555	284
Thomlinson v. Smith	Finch, 378	200
Thompson v. Palmer	[1893] 2 Q. B. 80	436
——— v. Percival	5 B. & Ad. 925	428
——— v. Thompson	11 W. R. 797	284
Tickle v. Brown	4 A. & E. 369	52
Tinkler v. Wandsworth District Board of Works	2 De G. & J. 261	486
Tollet v. Tollet	2 P. Wms. 489	186
Tolson v. Sheard	5 Ch. D. 19	183
Topham v. Portland (Duke of)	Law Rep. 5 Ch. 40	185
Treowell, In re	[1891] 2 Ch. 640	363
Trevor v. Whitworth	12 App. Cas. 409	15
Truscott v. Merchant Taylor's Company	11 Ex. 855	70
Tullock v. Dunn	Ry. & Mood. 416	284

U.

Underhill v. Roden	2 Ch. D. 494	365
Urquhart v. Butterfield	37 Ch. D. 357	492

V.

Vaughan v. Vanderstegen	2 Drew. 363	478
Viney v. Chaplin	2 De G. & J. 468	275
Viret v. Viret	17 Ch. D. 365, n.	478

W.

Wainman v. Field	Kay, 507	351
Wake v. Sheffield (Mayor of)	12 Q. B. D. 142	26
Walthamstow Local Board v. Staines	[1891] 2 Ch. 606	26
Ware v. Polhill	11 Ves. 257	458
Warrender v. Warrender	9 Bll. (N.S.) 89	495
Webb v. Bird	10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841	59
Webber v. Stanley	16 C. B. (N.S.) 698	251
Wells, In re	43 Ch. D. 281	1
Wenham, In re	[1892] 3 Ch. 59	294
West Cornwall Railway Company v. Mowatt	17 L. J. (Ch.) 366	324
Westcott v. Culliford	9 Hare, 265	351
Wheldale v. Partridge	8 Ves. 227	247
Whistler v. Webster	2 Ves. 367	500
Whitehouse & Co., In re	9 Ch. D. 595	99
Whitley v. Challis	[1892] 1 Ch. 64	438
Whittle v. Henning	2 Ph. 731	479
Wilder v. Pigott	22 Ch. D. 263	474
Wilkinson v. Verity	Law Rep. 6 C. P. 206	155
——— v. Wilkinson	3 Sw. 515	506

		PAGE
Williams *v.* Baily	Law Rep. 2 Eq. 731	480
——— *v.* Glenton	Law Rep. 1 Ch. 200	278
Williams' Settled Estates, In re	W. N (1878) 189	431
Willmott *v.* London Celluloid Company	31 Ch. D. 425; 34 Ch. D. 147	99
Wilson *v.* Maddison	2 Y. & C. Ch. 372	225
——— *v.* Sewell	4 Burr. 1975	185
Winterbottom *v.* Derby (Lord)	Law Rep. 2 Ex. 316	52
Witherby *v.* Rackham	7 Times L. R. 380	477
Wood *v.* Drew	33 Beav. 610	422
Wood's Ships' Woodite Protection Company, In re	62 L. T. (N.S.) 760	99

Y.

Yates *v.* Maddan	3 Mac. & G. 532	225
Young & Harston's Contract, In re	31 Ch. D. 168	273
- *v* Brassey	1 Ch. D. 277	435

CENTRAL SECRETARIAT LIBRARY

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re HUMPHREYS.
HUMPHREYS *v.* LEVETT.

[1892 H. 1247.]

C. A.
1892
NORTH, J.
June 2, 16; *July* 9; *Dec.* 20.
C. A.
1893
April 17, 24.

Infant—Vested Life Interest—Income—Accumulations—Right to Fund accumulated during Minority—Remaindermen—Contrary Intention—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43, *sub-ss.* 2, 3.

By a will which contained no maintenance or accumulation clauses applicable to residue, a testator gave to his granddaughter *A.* an immediate vested life interest in a share of his residuary estate, with remainder to her children. At the time of the testator's death in 1883, *A.* was an infant, and under the powers of the *Conveyancing Act*, 1881, s. 43, the trustees applied part of the income of her share for her maintenance and accumulated the remainder. *A.* married in 1887, and subsequently attained twenty-one, and there was issue of the marriage.

It was contended on behalf of her infant child that the accumulations between the death of the testator and the marriage of *A.* must, under sub-sect. 2 of sect. 43 of the *Conveyancing Act*, 1881, be treated, not as income payable to *A.*, but as capital to be invested for the benefit of herself for life, and afterwards for her children as the persons who ultimately became entitled to the property from which such accumulations arose:—

Held (affirming the judgment of *North*, J.), that the gift of an immediate vested life interest to *A.* was an expression of a "contrary intention" within sub-sect. 3 of sect. 43, so as to exclude the operation of sub-sect. 2, and that *A.* was absolutely entitled to the accumulations.

In re Wells (1) approved.

APPEAL from Mr. Justice *North*.

The testator, *W. C. Humphreys*, by his will dated in 1878,

(1) 43 Ch. D. 281.

C. A
1893
In re
HUMPHREYS.
HUMPHREYS
v.
LEVETT

devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and directed them, after payment of certain legacies by his will bequeathed, to hold the residue of his estate in trust for all or any of his three daughters and his granddaughter *Angela Humphreys Drummond* (now Mrs. *Levett*) who should attain twenty-one, or marry under that age with the consent of their guardians; giving further directions as to the settlement of their shares.

By a codicil to his will, dated the 27th of April, 1882, the testator provided as follows: "I declare that the trustees or trustee for the time being of my will shall stand seised of my messuage and hereditaments at *Bursledon*, known as '*Highfield*,' now in lease to Mrs. *Beale Brown*, upon trust, during the lifetime of my granddaughter *Angela Humphreys Drummond*, either to permit her to occupy the same, or to pay to her the annual income thereof for her separate use, and so that she shall have no power to anticipate the growing payments thereof. And after her death, then in trust for such of her children as, whether in her lifetime or after her decease, shall attain the age of twenty-one years, equally between them, and in default of such issue then in trust for my three daughters, *Beatrice Caroline Letitia*, *Ada Mabel*, and *Julia Wiggett*, and their issue respectively, as a part of their respective shares of my residuary estate under my said will, with the like powers in all respects. I empower my trustees or trustee, but without responsibility for any omission so to do, to repair and insure against loss by fire my said messuage and hereditaments at *Bursledon* aforesaid out of the rents or *corpus* thereof, or the income or *corpus* of the share of my said granddaughter under my will. And I empower my trustees or trustee to sell or lease, as in the case of my residuary estate under my will, my said messuage and hereditaments at *Bursledon*; but no sale and no lease for a longer term than three years in possession of my said last-mentioned messuage and hereditaments shall be made during my said granddaughter's minority, and no sale or lease thereof, after her majority during the remainder of her life, shall be made without her consent in writing. I revoke the trusts of the share in my residuary estate directed by my will to be

held in trust for my said granddaughter and her issue, and I declare that such share shall be held upon the trusts and subject to the powers and provisions hereinbefore declared concerning my said messuage and hereditaments at *Bursledon* known as *Highfield*."

Before the date of this codicil the three daughters of the testator had attained twenty-one. The testator died on the 17th of October, 1883. At the time of his death his granddaughter, Mrs. *Levett*, was an infant and unmarried. In April, 1887, she married, whilst still an infant, with the consent of her guardian, and she attained twenty-one in 1891, and now had certain children. No maintenance or accumulation clauses applicable to residue were contained either in the will or the codicil; but under the powers of the *Conveyancing Act*, 1881, s. 43, from the time of the testator's death down to the date of Mrs. *Levett's* marriage, the trustees paid or applied part of the income of the messuage and hereditaments at *Bursledon*, and of Mrs. *Levett's* share in the residue, for or towards her maintenance, and accumulated the residue of such income in the manner prescribed by the 2nd sub-section of sect. 43.

This was an adjourned summons raising the questions—(1.) whether on the language of the will and codicil Mrs. *Levett* took a vested or a contingent interest; and (2.) whether she was entitled to the accumulations of income, or whether they must be treated as capital, so as to go with the original fund to her children, subject to her life interest in the income of the fund consisting of such accumulations (1).

(1) Sect. 43 of the *Conveyancing Act*, 1881, is as follows:—

"(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not. (2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who

C. A.
1893
In re HUMPHREYS.
HUMPHREYS v. LEVETT.

The summons came on for hearing before Mr. Justice *North* on the 2nd of June, 1892.

Dare, for the Plaintiffs, who were the trustees of the will.

Cozens-Hardy, Q.C., and *Leverson*, for Mrs. *Levett*.

Jessel, for Mrs. *Levett's* infant children.

Charles Browne, for the testator's daughter.

A long argument took place on the question whether, on the assumption that Mrs. *Levett's* interest was contingent, the advances which were made out of income for her maintenance during her infancy had been properly made, and whether the decision of Mr. Justice *North* in *In re Jeffery* (1) ought to be followed. As, however, the decision of the Court did not turn upon this point, it is considered unnecessary to report this argument.

1892. Dec. 20. NORTH, J., held, upon the construction of the codicil, that Mrs. *Levett's* interest was vested, not contingent. And his Lordship added:—

Therefore the whole of the income in question belonged to her, and the advances which were made out of income for her maintenance were properly made, and, if the advances did not exhaust the whole of the income, the residue belongs to her, and must now be paid to her.

The result is, that the question which was so elaborately argued, whether my decision in *In re Jeffery* ought to be followed, does not arise.

W. L. C.

C. A.

The daughters of the testator appealed against the decision

ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year. (3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

(1) [1891] 1 Ch. 671.

that Mrs. *Levett* took a vested share; and Mrs. *Levett's* infant children appealed against the decision as to the accumulations. The appeal was heard on the 17th of April, 1893.

Charles Browne, for the Appellants, on the first point, contended that Mrs *Levett* only took a contingent interest.

Jessel, for the infants, on the second point:—

The *Conveyancing Act*, 1881, s. 43, introduces into this will the ordinary provisions as to maintenance and accumulation which a conveyancer would previously have inserted. The various sub-sections of this section must be read together, and in accordance with their language the accumulations of income from the death of the testator in October, 1883, to April, 1887, when Mrs. *Levett*, by her marriage, attained a vested interest, should have been held by her trustees upon trust for her for her life, and subject thereto for such of her children as shall attain twenty-one or marry, because they are the persons who ultimately become entitled within the meaning of sub-sect. 2 of sect. 43 to the property from which the accumulations arose. The effect of the section, taken all together, is to capitalize these accumulations, and I submit that the decision in *In re Wells* (1) cannot stand. The word "property" in this section means the principal sum from which the accumulations have arisen, and not the income itself. And, again, the word "ultimately" must refer to the persons entitled in reversion or remainder, and does not aptly describe a person entitled to a life interest, or a tenant for life: *Key* and *Elphinstone's* Precedents (2); *In re Buckley's Trusts* (3).

Cozens-Hardy, Q.C., and *Leverson*, for Mrs. *Levett*, upon the second point:—

Upon the death of the testator Mrs. *Levett* became entitled to an immediate vested life interest in the property from which the accumulations arose. It was not the intention of the statute to alter the devolution of property, and the language of sect. 43 ought not to be so read as to cut down the immediate vested interest given to Mrs. *Levett*. *In re Wells* was rightly decided.

(1) 43 Ch. D. 281. (2) 3rd Ed. vol. ii. p. 465, note.
(3) 22 Ch. D. 583.

C. A.
1893
In re HUMPHREYS.
HUMPHREYS *v.* LEVETT.

In this case the instrument under which the interest of the infant arose, in giving her an immediate vested life interest, expressed a contrary intention within the meaning of sub-sect. 3, and consequently sub-sect. 2 does not apply: *In re Dickson* (1); *Davidson's* Com. Forms (2). The word "property" does not necessarily mean *corpus*. Income is also property; a life interest in income is property, and the person entitled to such life interest is the "person ultimately entitled" within the meaning of the section, for otherwise there would be no direction in it what was to be done with the accumulations.

Dare, for the trustees.

Jessel, in reply, cited *Davidson's* Precedents (3), and *In re Thatcher's Trusts* (4).

April 24. LINDLEY, L.J. (after holding upon the first point that the effect of the codicil was to give Mrs. *Levett* an immediate vested life interest, continued):—

Under these circumstances it is unnecessary to consider to whom the accumulations in question would have belonged if the gift of the residue had been unaltered by the codicil, and I pass to the second point.

This, in my opinion, turns also upon the true construction of the codicil. If we look at that it is plain that the income of the granddaughter's share of the residue is given to her from the death of the testator. The whole income is given to her. Any of it not required to be expended on her while she is under age and unmarried does not cease to be hers; it remains hers, and hers as income. There is nothing in the codicil which gives it to any one else, or which qualifies the gift to her.

The 43rd section of the Act has no doubt to be applied; but the second sub-section is in this case excluded by the third. The true construction of the section was pointed out by Lord Justice *Fry* in *In re Dickson* (5), where he says (6): "Then we have to

(1) 29 Ch. D. 331, 335.
(2) Pages 159, 176, 186.
(3) 3rd Ed. vol. iv. pp. 44–46.
(4) 26 Ch. D. 426.
(5) 29 Ch. D. 331.
(6) Ibid. 338, 339.

deal with the 43rd section, in which there are two very remarkable provisions. The one is, that the section is to apply, whether the instrument under which the question arises came into operation before the commencement of the Act or after the commencement of the Act. That evidently shews an intention not to affect the construction of wills, because it would be plainly unreasonable to apply to past wills, a section which is intended to affect the operation and construction of wills. The other is sub-sect. 3, which declares that the section 'applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.' It appears to me that, taking those two clauses together, they mean that all that has gone before with regard to maintenance is made subject to the will or other instrument under which the infant claims, and that the construction of the will or other instrument is not in terms affected by this section."

The codicil in this case is inconsistent with any accumulation of income for the benefit of the children of the granddaughter. The codicil gives the whole income to her. This brings the case within sub-sect. 3 and excludes sub-sect. 2.

With respect to the case of *In re Wells* (1), which we were asked to overrule, I am of opinion that the decision was correct having regard to the terms of the will and to sub-sect. 3 of sect. 43 of the *Conveyancing Act*, 1881, which in that case, as well as in this, excluded sub-sect. 2. It may be that the result, which I think it safer to arrive at by aid of sub-sect. 3, can be reached without the aid of that sub-section by construing sub-sect. 2 as suggested by Mr. Justice *North*, when that sub-section has to be applied to the case of a tenant for life becoming absolutely entitled to the income in possession. I have some doubt about this, but I desire to leave the point open until the necessity for deciding it arises. Both appeals must be dismissed.

BOWEN, L.J., concurred.

(1) 43 Ch. D. 281.

C. A
1893
In re
HUMPHREYS
HUMPHREYS
v.
LEVETT.

KAY, L.J. (after delivering judgment upon the first point, and coming to the same conclusion upon the construction of the will and codicil, continued):—

As to the question who is entitled to the interest, there can be no doubt that, if the granddaughter, as I hold, became entitled on the testator's death to a vested interest for life in one-fourth of the residue, she must be entitled to the income of that one-fourth notwithstanding her infancy. It is argued that sect. 43 of the *Conveyancing Act*, 1881, must be read as though it were part of the codicil, and that it directs an accumulation of all the income not actually applied for the benefit of the granddaughter during her minority, and that such accumulations shall be held "for the benefit of the person who ultimately becomes entitled to the property from which the same arose." This form is borrowed from the usual form, which applied generally when the infant's estate was not for life, but absolute. It is made by sect. 43 to apply where the infant's estate is for life, as well as where it is absolute. But I think that the next part of the section removes the difficulty. It provides in effect that sect. 43 is to apply only if and so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises. I agree that the object of this statutory provision was not to alter the rights of the infant. It was not intended to take away from the infant the income of a vested life estate which had actually accrued; and I am of opinion that when the instrument confers such a vested life interest, an intention not to convert the income of that life estate into capital does sufficiently appear, and that, notwithstanding the language of sect. 43, the arrears of income still belong to the infant.

Solicitors: *Clowes, Hickley, & Steward; Upton, Atkey, & Upton; J. A. Levett; G. Rastrick.*

W. W. K.

In re EDDYSTONE MARINE INSURANCE COMPANY.

C. A.
1893
WRIGHT, J.
March 7.
C. A.
June 8.

Company—Issue of Paid-up Shares—Registered Contract—Consideration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 4—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A company limited by shares, formed under the *Companies Act*, 1862, has no power to issue shares as fully paid up, as a free gift or bonus, to its shareholders, although a contract to do so has been made without any fraudulent intent and registered under sect. 25 of the *Companies Act*, 1867.

A company formed under the *Companies Act*, 1862, was carried on for some years as a private company, all the shares which were issued being in the hands of a limited number of shareholders. It was then decided to throw the company open to the public; but before doing so, the company passed resolutions to allot a certain number of shares as fully paid to the directors and original shareholders. Accordingly, a contract was executed between the company and the shareholders, and registered under the 25th section of the *Companies Act*, 1867, by which it was agreed that those shares should be allotted to the directors and shareholders in consideration of their past services and expenses in forming the company and establishing the business; and on the registration of this contract the shares were allotted as agreed. The company proved unsuccessful and was wound up. The liquidator placed the directors and original shareholders on the list of contributories for the shares so allotted as unpaid shares:—

Held (affirming the decision of *Wright*, J.), that on the evidence no payment either in money or money's worth had been made for the shares, and that the directors and shareholders must be held liable for the full nominal value of the shares.

THE *Eddystone Marine Insurance Company, Limited*, was incorporated under the *Companies Act*, 1862–1886, on the 14th of September, 1887, for the purpose of granting and effecting marine insurance and reinsurance. The nominal capital of the company was £20,000, divided into 200 shares of £100 each.

At first the company was worked upon the principle of a private partnership. Only £4000 of the capital was subscribed, and the shares were held by sixteen persons only; but early in 1888 it was proposed to throw open the company to the outside public, and to issue the balance of the capital, it being part of the scheme that £6000 of fully paid-up shares should be first allotted to the existing directors and shareholders.

C. A.
1893
In re
EDDYSTONE MARINE INSURANCE COMPANY

Accordingly, at an extraordinary general meeting of the shareholders held on the 27th of February, 1888, it was resolved that, after allotting to the original shareholders of the company £6000 of fully paid-up shares, to be registered as considered fully paid-up shares, the whole of the unallotted capital of the company should be offered for subscription; it was further resolved that such shares should be allotted as between directors and ordinary shareholders in the proportion of three to one, and that the capital then remaining uncalled should be sub-divided into £20 shares. These resolutions were duly confirmed at an extraordinary general meeting held on the 14th of March, 1888.

Two of the original shareholders were *Henry* and *John Greenway*, who carried on business as solicitors in *Plymouth* under the name of *Greenway & Son*, and acted as solicitors to the company. *Henry Greenway* was also a director of the company from its commencement until its winding-up.

On the 7th of May, 1888, Messrs. *Greenway & Son* wrote to Mr. *R. Jordan*, who was a company registration agent, to the effect that it had been decided that £6000 fully paid-up shares should be allotted to the original shareholders "in lieu of promotion money," and asking his advice as to the necessity of registering the resolution, and after some further correspondence, Mr. *Jordan*, in a letter of the 14th of May, objected to the resolution on the ground that it did not shew for what purpose the shares were to be issued as fully paid, and advised that another resolution should be passed and confirmed, and that, after registration of such resolution, an agreement should be entered into and duly registered before the issue of the shares; and on the following day he sent to Messrs. *Greenway & Son* a draft resolution. This letter was acknowledged by Messrs. *Greenway* by a letter of the 15th of May, which contained this statement: "The company was first started as a syndicate, and in consideration of opening up the company it was decided to issue these bonus shares."

On the 24th of May an extraordinary general meeting of the shareholders was held in which a resolution in the terms suggested by Mr. *Jordan* was proposed and carried. It was to the following effect: "That in consideration of services rendered to the *Eddy-*

stone Marine Insurance Company, Limited, in its formation, and in establishing its business by" (then followed the names of the sixteen original shareholders and directors), "it is hereby resolved that 300 shares of £20 each in the said company, to be credited in the company's books as fully paid up and free from any liability for such payment, be allotted to the said persons in the following proportions." Then followed a list of allottees, from which it appeared that thirty shares were to be allotted to *Henry Greenway* and ten to *John Greenway.* And the resolution concluded by empowering the directors to take all necessary steps to carry the resolution into effect. This resolution was confirmed at an extraordinary general meeting held on the 9th of June. After this resolution was passed and confirmed, a further correspondence took place between Messrs. *Greenway & Son* and Mr. *Jordan,* in the course of which Mr. *Jordan* advised that the shares to be issued in pursuance of such resolution must be the subject of a contract which he drafted.

On the 15th of June, 1888, an agreement was entered into between the company of the first part and the persons named in the resolution of the second part in accordance with the draft sent by Mr. *Jordan.* It recited that the company was indebted to the parties of the second part for services rendered and expenses incurred by them in the formation of the company and establishing its business, and that the company, being desirous to remunerate the said parties of the second part for such services and expenses, had duly passed and confirmed the resolution above stated, and it was thereby agreed that the company would immediately cause the agreement to be filed with the Registrar of Joint Stock Companies, in pursuance of sect. 25 of the *Companies Act,* 1867, and would thereupon issue to the parties of the second part the 300 shares referred to in the foregoing resolution, and that each of the said shares should be deemed to be fully paid up and free from any further liability.

This agreement was duly filed on the 4th of July, 1888, and the shares were shortly after issued, including thirty to *Henry Greenway,* and ten to *John Greenway.*

The company carried on business at a loss until November, 1890, when a compulsory order was made for its winding-up.

C. A.
1893
In re EDDYSTONE MARINE INSURANCE COMPANY

In the winding-up the liquidator placed the holders of the 300 fully paid-up shares, including the Messrs. *Greenway*, on the list of contributories. The matter came before the Chief Clerk on notice to settle the list of contributories, and he directed that the cases of *Henry Greenway* and *John Greenway* should be placed in the list of witness actions, and the matter came on to be heard before Mr. Justice *Wright* on the 7th of March, 1893.

No attempt had been made by the *Greenways* to repudiate these shares during the existence of the company; but they had received dividends upon them, and had voted at the meetings of the company, and *Henry* had transferred some of his shares.

Henry Greenway deposed, with reference to the services rendered by his firm to the company, that prior to the resolution of the 24th of May, 1888, his firm had effected an arrangement with the *Commercial Union Assurance Company* that, in consideration of his firm transferring their insurance business to the *Commercial Union*, they would in return effect insurances of the vessels on some of their excess lines with the *Eddystone Marine Insurance Company*, and would accept their policies, and that this arrangement had been carried into effect; and further, that his firm had been instrumental in procuring applications for a considerable number of ordinary shares of the company; but he admitted, on cross-examination, that the question of services was not discussed at the meeting of the 27th of February. He also stated, on cross-examination, that the original directors and shareholders resolved to allot among themselves what they estimated to be the value of the goodwill and cash in hand, and that though the allotment had reference to services rendered there had been no valuation of the services of the individual directors.

Chadwyck Healey, Q.C., and *Younger*, for the liquidator.

Neville, Q.C., and *George Henderson*, for *Henry* and *John Greenway*.

WRIGHT, J.:—

The first question in this case is whether these shares ever were, in fact, paid for at all; and the other question is one of

law, whether Messrs. *Greenway* are liable to be put on the list of contributories as for unpaid shares.

Before dealing with those questions I desire to say that I think the conduct of the Messrs. *Greenway* and of all the other gentlemen concerned is entirely free from any shadow of blame or impropriety. They acted with perfect honesty, and they took every means in their power to prevent creditors or persons dealing with the company from being in any way misled. I unfortunately am constrained to come to the conclusion that they are liable; but I do so with great regret, because I think that sect. 25 of the Act of 1867 operates with extreme hardship in a case of this kind.

With regard to the first question, the only thing amounting to anything like evidence of payment is the registered agreement itself, where it is said that the company were indebted to those gentlemen for services rendered and so forth; but I cannot help coming to the conclusion that on the true view of the facts there never was anything in the nature of payment for these shares. At the meetings in February nobody knew anything about this difficulty, and no suggestion was made in February, when the resolution was first come to to allot these bonus shares, that they were to be for services or were to be treated as paid in any way; on the contrary, I find from the correspondence that on the 7th of May Mr. *Greenway* himself writes that the bonus shares are intended to be in lieu of promotion money. On the 14th of May the *Greenways* are warned by the *London* broker that the bonus shares cannot be validly issued except for payment, and the *London* agent himself suggests the very form which was afterwards adopted in the resolution of May and in the registered agreement, viz., declaring the bonus shares to be in consideration of services rendered in the formation of the company. But on the 15th of May Messrs. *Greenway* write: "The company was first started as a syndicate, and in consideration of opening up the company it was decided to issue these bonus shares"; and in his evidence Mr. *Henry Greenway* said: "When we resolved upon throwing open the company to the public we allotted amongst ourselves what we estimated to be the value of the goodwill and cash in

C. A
1898
In re
EDDYSTONE MARINE INSURANCE COMPANY.
Wright, J.

hand. We did have reference to services." Each director and shareholder was to have the same number of shares, and there is no suggestion to my mind that there was any attempt on the part of the company, or of these gentlemen, to make any estimate of the value of the services which each director or shareholder had rendered, and to give an equivalent number of bonus shares for those services in each case. I am driven to come to the conclusion that the real explanation is what Mr. *Greenway* said in cross-examination: "We thought we had built up a little gold mine." And then he said to the effect that when they were throwing the concern open to the public they thought it only right that the directors and shareholders who had started this concern should share the benefit.

Now, if that is so, I think that these shares never were paid for. As I understand the law, shares cannot be paid for except by money or money's worth, and, apart from the question of registered contracts, shares cannot be paid for by treating as a debt that which was not a debt at all. When Mr. *H. Greenway* rendered his services in the promotion of the company—services which, I think, were not of any very great importance—it is clear to my mind that it was not intended that he should ever be paid for them. There never was a debt due to him from the company for those services.

That being so, under the *Companies Act* of 1862 it appears to me plain that there never was anything which the law could treat as payment for these bonus shares.

Then does it make any difference that there was a registered contract under sect. 25 of the Act of 1867? I think clearly not. That section is not intended to turn into payment that which never was payment at all. It is merely intended to provide for payment otherwise than in cash, and it does not help the *Greenways* in any respect.

But then it is said that, inasmuch as this was a contract under which the company purported to issue these shares as fully paid, they cannot blow hot and cold, and cannot fix the *Greenways* with a liability to contribution—a liability as contributories under a contract which on the face of it expressly relieved them from any liability of that kind; and the observations of the late

Master of the Rolls in *Anderson's Case* (1) were relied on. That was the case of a voluntary winding-up, and that might possibly make a difference. But, however that may be, the principle of law established by almost every case for several years past is that parties who are sought to be made contributories in respect of shares which have been allotted to them as fully paid up cannot get out of their liability to pay the calls on such shares merely on the allegation that it was *ultrà vires* to issue shares in that form. See *Ooregum Gold Mining Company of India* v. *Roper* (2); *Trevor* v. *Whitworth* (3); *In re Addlestone Linoleum Company* (4); *In re London Celluloid Company* (5); and *Ex parte Sandys* (6).

But there is another point which the *Greenways*, I am afraid, cannot get out of. They accepted these shares and acted as shareholders for something like eighteen months; they (more especially Mr. *Henry Greenway*) attended meetings, accepted dividends, and voted as shareholders, and did everything which would amount to evidence of acceptance of the shares; and if there had been no liquidation, it is clear that under those circumstances they could not then turn round and claim against the company that the register should be rectified. That was the point decided in *Ex parte Sandys*. There there was no liquidation, and a lady who had accepted fully paid-up shares asked the Court to relieve her from her contract; but the Court of Appeal held that, as she had elected to keep the shares, knowing perfectly well that the law would not allow them to be treated as fully paid-up—or at least having the full means of knowledge—she could not then turn round and claim to be relieved from them.

Upon all these grounds I am obliged to hold that Messrs. *Greenway* are rightly put in the list of contributories, and they must pay the costs of these proceedings.

H. B. H.

C. A.

From this judgment *Henry* and *John Greenway* appealed. The appeal was heard on the 8th of June, 1893.

(1) 7 Ch. D. 75.
(2) [1892] A. C. 125.
(3) 12 App. Cas. 409.
(4) 37 Ch. D. 191.
(5) 39 Ch. D. 190
(6) 42 Ch. D. 98.

C. A.
1893
In re EDDYSTONE MARINE INSURANCE COMPANY

Neville, Q.C., and *George Henderson*, for the Appellants:—

The learned Judge held in our favour that there was no fraud or improper motive in the transaction, and that the contract was registered before the shares were issued. Therefore, the only question is whether the allotment of the shares as fully paid up was *ultrà vires*, because the full value was not paid in money or money's worth. Our contention is, that if there is a registered contract within the 25th section of the *Companies Act*, 1867, the Court will not look behind the statement of consideration contained in the contract. If the transaction is not *bonâ fide*, the company may take proceedings to set it aside; but while the contract remains unimpeached, the company is estopped by the statement in the contract, and the liquidator is bound to treat the shares as fully paid up. The Appellants never contracted to take any of the shares except as fully paid up, and if the contract is set aside their whole liability ceases. The case relied on by the learned Judge was *Ooregum Gold Mining Company of India* v. *Roper* (1); but that case only decides that, where shares are issued in consideration of a money payment, they cannot be issued for less than the full nominal value. And *In re Almada and Tirito Company* (2) is to the same effect. But there is no case which decides that, where there is a registered contract to issue shares, made *bonâ fide* but not for a money consideration, the company cannot issue shares as fully paid up; and there is nothing in public policy to forbid it. The registration of the contract is sufficient and adequate protection to the public. Although the company owed no legal debt to the shareholders, the services they had rendered were sufficient consideration for the agreement, if any consideration is necessary: *Henderson* v. *Bank of Australasia* (3); *In re Plaskynaston Tube Company* (4); *In re British Seamless Paper Box Company* (5); *Anderson's Case* (6); *Ex parte Sandys* (7).

Chadwyck Healey, Q.C., and *Younger*, for the liquidator, were not called on.

(1) [1892] A. C. 125.
(2) 38 Ch. D. 415.
(3) 40 Ch. D. 170.
(4) 23 Ch. D. 542.
(5) 17 Ch. D. 467.
(6) 7 Ch. D. 75.
(7) 42 Ch. D. 98.

LINDLEY, L.J.:—

This case is in some respects a hard one on these gentlemen, because I quite agree with Mr. Justice *Wright* that everything that has been done in this case has been done openly and honestly and *bonâ fide*. There is no attempt to conceal or to take anybody in or anything of the kind. But the question is whether what has been done is authorized by the Acts of Parliament which relate to limited companies. The facts may be stated very shortly. This was a small company, what is called a private company; that is to say, the persons who composed it were not numerous, there being about sixteen of them. They did not contemplate appealing to the public to take up a large issue of shares, and they came to the conclusion that they all might have some paid-up shares for nothing. They resolved by special resolution which was duly confirmed to give each other and to allot to each other fully paid-up shares for nothing. I say distinctly for nothing, because, having gone through the correspondence with Mr. *Jordan*, and having seen how the expression "in consideration of services" got into the contract, it is obviously a mere blind. There is nothing dishonest in that that I know of; but can it be done? Having passed those resolutions the directors allotted and the other shareholders accepted shares in this company, which purport to be fully paid-up shares and for which nothing has been paid. Now, unfortunately, the company has got into liquidation, and the liquidator finds these gentlemen registered as shareholders in respect of these shares which purport to be fully paid up. He looks into it and says, "They are not paid up at all. Therefore the allottees must pay them up." They say, "No, we are not liable to pay up because these shares have been allotted to us as fully paid in consideration," as it is expressed, "of services." I put the services out of the question. I treat it as a simple proposition of law, new so far as I know in detail, but I do not say new in principle. Can a limited company give its members fully paid-up shares for nothing, so that when the company is wound up those shareholders are not liable to pay calls in respect of those shares? Now the answer to that question of law to my mind is clearly that they cannot do it. It is contrary to the Act of Parliament. To

C. A.
1893
In re EDDYSTONE MARINE INSURANCE COMPANY
Lindley, L.J.

make that out we must look, not at the *Companies Act*, 1867, but we must go beyond that to the *Companies Act* of 1862 and see what it is that a shareholder in a company becomes liable to do when he takes shares. The sections which are important are those which I referred to in the course of the argument—sect. 8, and sect. 38, sub-sect. 4. When a man takes shares in a company, whether limited or unlimited, what is his liability? His liability is upon winding up to contribute in proportion to his share to the liquidation of the debts and the expenses of winding up. If it is an unlimited company he must do so to his utmost farthing. If it is a limited company there is a restriction put upon that liability. The restriction is expressed in sub-sect. 4, which says this: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable." Now, pausing there for a moment, if he has paid nothing what is he liable for? Only the nominal amount of the shares he has taken up in the limited company. If he has paid something he must pay the difference. I agree that under the Act of 1862 payment need not have been in cash, for it was decided in a great many cases that it might be paid in land, goods, or services That state of the law led to considerable abuses which are perfectly well known to those who have had much experience in company matters, and the law was altered by the Act of 1867. The Act of 1867 says that shares are to be paid up in cash unless it is otherwise agreed by a registered contract. But the Act of 1867 does not affect the liability to pay in some shape or other. The liability to pay is imposed, not by the Act of 1867, but by the Act of 1862. The difficulty here is that nothing has been paid, and although there is an agreement registered to the effect that nothing shall be paid that is contrary to the Act of Parliament. That is the whole solution of this case.

I do not propose to refer to the authorities, because although the case is new in point of detail it is covered in point of principle by a string of authorities. The leading one is *Trevor* v. *Whitworth* (1) in the House of Lords; but the later case of the

(1) 12 App. Cas. 409.

Ooregum Gold Mining Company of India v. *Roper* (1), which shews that a company cannot issue shares at a discount so as to relieve a person taking shares at a discount from liability to pay the proportion of the shares which has not been paid, is conclusive to shew that if he has paid nothing at all he must pay in full. To my mind the case is as plain as it can possibly be. Mr. *Henderson* has argued that you cannot enforce the liability on such an application as this, and that some proceedings must be taken to get rid of the contract. But if once you arrive at the conclusion that this stipulation that the shares were to be taken as paid up in full, was *ultrà vires*, the company cannot be estopped by putting into the document an untruth. I have no doubt that the decision is right, though I think it is hard upon those gentlemen who did not know the law, and thought they were keeping on the right side and find they were on the wrong side. The appeal must be dismissed.

LOPES, L.J.:—

It appears to me that this case is an easy case if, as I think, that which took place was a gift of these paid-up shares. I have come to the conclusion in truth and in fact it was nothing more than a mere gift.

Mr. *Neville* boldly asserted that paid-up shares might be given in the way that these were, to directors or to shareholders. Now I cannot think that that is good law. The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit. How? On the terms that there shall be and remain a liability up to that limit: see *Buckley* (2). Now, how can that liability be got rid of? It appears to me that that may be answered by reading a few lines from the judgment of Lord *Halsbury* in the case of the *Ooregum Gold Mining Company of India* v. *Roper* (3), where he says: "My Lords, the whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act. Now, confining myself for the

(1) [1892] A. C. 125. (2) 6th Ed. p. 560.
(3) [1892] A. C. 133.

C. A
1893
In re
EDDYSTONE
MARINE
INSURANCE
COMPANY
Lopes, L J

moment to the Act of 1862"—I think it is not necessary to go beyond that Act for the purpose of deciding the case which we have now before us—"it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares." It seems to me that that passage is a complete answer to this case. The only other point that was made was with regard to the estoppel which has been dealt with by Lord Justice *Lindley*, and I entirely agree with what has been said by him on that subject—that in the circumstances of this case there is no estoppel.

A. L. SMITH, L.J.:—

I am of opinion that the judgment of my Brother *Wright* is correct, and that his decision should be upheld. When one understands the facts, and they are clear upon the documents, it appears to me to be a plain case.

The liquidator of the *Eddystone Marine Insurance Company* seeks to place upon the list of contributories Mr. *Henry* and Mr. *John Greenway*. They undoubtedly are holders of what they assert to be fully paid-up shares, one holding thirty and the other ten. The liquidator's case is: "These gentlemen are shareholders, but are not holders of fully paid-up shares. I want to place them on the list of contributories so as to make them pay up what has not been paid up upon those shares which they respectively hold." Evidence is given, the liquidator asserting that these two gentlemen have paid nothing, and they on the other hand asserting they have paid up everything, by reason, to use the expression in the agreement registered under sect. 25, of "services rendered and expenses incurred" by them in the formation of the company. Now that issue of fact had to be tried by the learned Judge, and in my judgment he is perfectly

right in the conclusion he has arrived at. He came to the conclusion that these shares had been given by the company to these two gentlemen, and that there were no services rendered or expenses incurred as consideration for this gift, in fact, that there was neither money nor money's worth given by these two gentlemen for the shares. What is the result? After the case in the House of Lords of the *Ooregum Gold Mining Company of India* v. *Roper* (1) the matter is unarguable, as it seems to me, for in that case the House of Lords decided that a company cannot issue to shareholders shares at a discount, or, in other words, cannot issue to shareholders £1 shares when only 15*s*. are paid so as to render them fully paid-up shares in a winding-up. If they cannot do that they clearly cannot issue to a shareholder a £1 share for nothing paid either in money or money's worth, so as to make it a fully paid-up share. These two gentlemen are consequently liable to be placed on the list of contributories for the whole amount of these shares, on which nothing in fact has been paid. I think the judgment appealed from was right.

Solicitors: *Davidson & Morriss; Gibbs, White, & Crocker.*

(1) [1892] A. C. 125.

M. W.

C. A.
1898
WRIGHT, J.
March 27, 28
C. A.
June 8, 9

MAYOR, ALDERMAN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE *v.* BROOKS.

[1892 F. 758.]

SAME *v.* LADD.

[1892 F. 762.]

Local Government—Streets—Paving Expenses—Apportionment—Dispute as to Apportionment—Arbitration—Right to sue—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Sect. 150 of the *Public Health Act,* 1875, empowers an urban authority to compel the owners of premises abutting on any street which requires repairing to make good the street, and in default to execute the work themselves and recover the expenses from the owners in default "according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration." A defaulting owner, on receiving notice of apportionment, sent to the authority a letter which appeared to be rather an objection to the prime cost of the work than to the mode in which that prime cost was apportioned:—

Held, by *Wright,* J., that a dispute as to the prime cost was not a dispute as to the apportionment within the section, and that the urban authority were not bound to go to arbitration before commencing an action to recover the apportioned amount.

Sandgate District Local Board of Health v. *Keene* (1) distinguished.

Held, by the Court of Appeal, that the letter might have been treated by the urban authority as not being a notice disputing the apportionment, but that as they had in letters to the owner, and by resolution passed at their own meeting, treated the letter as a good notice, it must be treated as such, and that an action brought by them before proceeding to arbitration must be dismissed.

Another owner disputed the claim of the urban authority in general terms:—

Held, by *Wright,* J., that this was a dispute as to the apportionment, and that the urban authority could not sue without first going to arbitration.

MAYOR, &c., OF FOLKESTONE *v.* BROOKS.

THE Plaintiffs were the urban sanitary authority for the borough of *Folkestone.*

The Defendant was the owner of certain premises abutting on two streets within the borough called respectively *Muddy Lane* and *Radnor Bridge Road.*

(1) [1892] 1 Q. B. 831.

In May, 1883, the Plaintiffs served notices, under sect. 150 of the *Public Health Act*, 1875 (1), on the owners and occupiers of the premises abutting on such streets, requiring them to pave and make good the streets; but such notices were not complied with, and the Plaintiffs did the work themselves at a cost of £503 15*s*.

Such sum was apportioned by the Plaintiffs' surveyor between the various owners, and on the 19th of February, 1885, notices of apportionment were sent out. Three notices were sent to the Defendant in respect of the several properties owned by him. They shewed the length of frontage of the various properties, the rate per foot at which the work was to be charged, and the sum chargeable on this basis in respect of each house. The sums chargeable to the Defendant amounted to £215.

On the 3rd of March, 1885, the Defendant wrote to the town clerk:—

"I beg to give notice of my objection to the accounts rendered, and call your attention to the same. The cost is greatly in excess of the cost per foot as given to me previous to the work being done, as I find that in other cases a smaller charge has been made."

To this the town clerk replied on the 6th of March:—

"Sir,—

Radnor Bridge Road and *Muddy Lane* Improvements.

"I beg to acknowledge the receipt of your letter of the

(1) Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . . is not sewered levelled paved metalled flagged channelled and made good . . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled . . . . require them to sewer level pave metal flag channel or make good . . . . the same within a time to be specified in such notice. . . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act . . ."

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS.
SAME v. LADD.

3rd inst. giving me notice of your objection to the apportionments made upon you by the surveyor in respect of these improvements. I know nothing whatever as to any prices which may have been given to you previous to the work being carried out. The surveyor has done the work and certified that a certain sum has been expended, and it is with this sum we have to deal, and not with rough figures which may have been mentioned in conversation. I would suggest that without prejudice you and the surveyor should meet and go into the items which you dispute, and failing an agreement being arrived at on items, that the matter be referred to arbitration in the usual way."

On the 10th of March the Defendant replied:—

"In reply to yours of the 6th inst. I find that Mr. *Hart's* executors are deciding first whether the road called *Muddy Lane* ought not to be paid for by Earl *Radnor*. And after that, or in the interval, I will arrange to meet Mr. *Conquest* upon the question of prime cost of work."

On the 6th of January, 1886, a special monthly meeting of the corporation was held, the minute of which was as follows:—

"*Radnor Bridge Road* and *Muddy Lane*. Apportionments disputed by Mr. *Brooks*.

"The town clerk reported that Mr. *William Brooks* had given notice disputing the apportionments which had been served upon him in respect of his properties in these two streets, and that it would therefore be necessary to appoint an arbitrator on the part of the corporation to adjudicate upon the matter. It was moved by Mr. Councillor *Penfold*, seconded by Mr. Councillor *Vaughan*, and resolved that the town clerk be instructed to serve the final demand upon Mr. *Brooks* for payment of the amounts of the apportionments made upon him by the surveyor in respect of the street improvements in *Radnor Bridge Road* and *Muddy Lane*, and in default of payment within seven days from date of service of apportionment, that Mr. *Albert Latham*, surveyor of *Margate*, be asked to accept the office of arbitrator on the part of the corporation, and subject to his assenting thereto, that he be, and is hereby, appointed the

arbitrator on the part of the corporation in the matter of these disputed apportionments, and that the corporate seal be affixed by the town clerk to the appointment of Mr. *Latham* as such arbitrator, and that the town clerk be instructed to give the necessary notices and to take the necessary steps of, and incident to, and generally to carry out this reference to arbitration on the part of the corporation."

On the 17th of March a circular was sent by the town clerk to several owners in *Muddy Lane* and *Radnor Bridge Road* including the Defendant. It was headed "Private Street Improvement Expenses. Disputed Apportionments," and it stated as follows:—

"Notice having been given to the corporation by various owners expressing themselves dissatisfied with and disputing the apportionments made upon them by the Borough Engineer, a committee has been appointed by the corporation to hear any complaints, and if you still think you have any grounds of complaint, I invite you to meet the committee at the *Town Hall* on Friday next the 19th inst. between the hours of 3 and 5 P.M. It must of course be understood that this is entirely without prejudice to the legal position and powers of the corporation, and simply with the view if possible of settling disputes without litigation."

On the 19th of March, 1886, a meeting was held of the Street Apportionments Committee. The minute, which was headed as follows, "Objection by Mr. *W. Brooks. Muddy Lane*," stated that Mr. *Fearon* appeared for Mr. *Brooks*, and that Mr. *Brooks* repudiated his liability altogether, in respect of the *Muddy Lane* Improvements, on the ground that the road had been a public highway for over forty years.

The matter then slept till the 16th of May, 1891, when the Plaintiffs served notice on the Defendant demanding payment of the apportioned amounts. On his neglecting to pay, they commenced this action for a declaration that they were entitled to charges on the Defendant's respective premises for the amounts mentioned in the notices of apportionment, and an order for the sale of such premises, and payment out of the proceeds of the said amounts with interest.

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v. LADD.

Among other defences raised by the Defendant he pleaded that each of the streets in question was a public highway repairable by the inhabitants at large, that he was not a frontager, and that inasmuch as he had disputed the apportionment, the Plaintiffs were not entitled to commence the action, but ought to have proceeded to arbitration in manner provided by the *Public Health Act*, 1875.

At the trial the Defendant abandoned every defence except the last.

The action came on for hearing before Mr. Justice *Wright* on the 27th of March, 1893.

Everitt, Q.C., and *Lewis Coward*, for the Plaintiffs.

Cozens-Hardy, Q.C. (*Swinfen Eady*, with him), for the Defendant, took the preliminary objection that the Plaintiffs ought to have proceeded to arbitration:—

The Defendant has disputed the apportionment, consequently the Plaintiffs cannot recover the amount of the apportionment until they have gone to arbitration: *Sandgate District Local Board of Health* v. *Keene* (1), a decision of the Court of Appeal.

Everitt, Q.C., and *Lewis Coward*, *contrà*:—

This is not an objection to apportionment, but is an objection to prime cost, and that distinguishes this case from *Sandgate District Local Board of Health* v. *Keene*. Being an objection to prime cost, the Defendant ought to have appealed to the Local Government Board under sect. 268 of the *Public Health Act*, 1875, and is estopped from raising that objection in this action: *Walthamstow Local Board* v. *Staines* (2); *Wake* v. *Mayor of Sheffield* (3). The Court of Appeal cannot have intended to decide that the question of prime cost should go to arbitration, because the arbitrator would have no power to deal with it: *Bayley* v. *Wilkinson* (4), approved in *Cook* v. *Ipswich Local Board of Health* (5).

Cozens-Hardy, in reply.

(1) [1892] 1 Q. B. 831.
(2) [1891] 2 Ch. 606.
(3) 12 Q. B. D. 142.
(4) 16 C. B. (N.S.) 161.
(5) Law Rep. 6 Q. B. 451.

WRIGHT, J.:—

In this case the Plaintiffs, as the local urban sanitary authority, seek to recover from the Defendant certain paving expenses under the 150th section of the *Public Health Act* of 1875. The work was done, and the expenses were apportioned by the surveyor of the local authority; and the Defendant, within the three months which the law allows him for disputing the apportionment, sent this letter to the town clerk: "I beg to give you notice of my objection to the accounts rendered, and call your attention to the same. The cost is greatly in excess of the cost per foot as given to me previous to the work being done, as I find that in other cases a smaller charge has been made."

The only defence insisted upon by the Defendant is that this is a dispute as to the apportionment which must be settled by arbitration before any debt can be regarded as due from him to the local authority, the corporation.

It is said, on the other hand, on the part of the Plaintiffs, that arbitration is not a condition precedent to the debt being due. [His Lordship referred to sect. 150 of the *Public Health Act*, 1875, and continued:—]

It must be taken for settled law that, where the local authority is acting within its jurisdiction, the Local Government Board in *London* alone can deal with disputes as to the propriety of the items of cost as charged before apportionment. That was so held in the case of the *Walthamstow Local Board* v. *Staines* (1). And there would seem to be some absurdity in holding that an arbitration must take place where it is legally manifest that no dispute exists except one which the arbitrator cannot entertain. On the other hand, unless the party to be charged has done something to preclude himself from saying that there is a further dispute which can be the subject of arbitration, he ought not to be denied that which is his right. But what is his right? His right is to dispute within three months, not the prime cost, but the apportionment. He need not give any reasons, or he may give bad reasons; but he must, in fact, dispute the apportionment; and if he does not within three months dispute the apportionment, the apportionment made by the surveyor stands,

(1) [1891] 2 Ch. 606.

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v. LADD.
Wright, J

and is a debt. If he does within three months dispute the apportionment, as he did in the *Sandgate District Local Board of Health* v. *Keene* (1), there is no debt until after arbitration.

In the present case the Defendant did not, as it seems to me, within three months, in fact, dispute the apportionment at all—he only disputed the prime cost. I have read his letter, and I need not read it again. Unless I am bound by *Sandgate District Local Board of Health* v. *Keene* to hold that any dispute of any kind raised within three months must go to arbitration, however fruitlessly, I think the Defendant is wrong. What he disputed within the three months was not the apportionment, but the accounts rendered, explaining afterwards that he meant that the cost was too high. With some doubt I have come to the conclusion that in the *Sandgate District Local Board of Health* v. *Keene*, the Court of Appeal did not mean that every kind of dispute must let in arbitration. There the notice given was as follows: "I have to point out that an error has been made in charging £25 19*s.* 11*d.*, out of a total cost of £61, as the amount due from me on the *Grafton House* property, as no paving, curbing, or channelling, has been done to the portion of the road that my land abuts on; therefore I request you now to go more carefully into the matter, and forward to me an amended statement." That was plainly a dispute of the apportionment, for the Defendant had admitted the amount of the cost. True, he disputed the apportionment on grounds other than mere error as to the extent of frontage; but he did dispute the apportionment—that is to say, he said to the local board, "You have called upon me to pay more than my proportion, and you ought to get that excess from some one else or bear it yourselves."

The judgment of the Master of the Rolls in the *Sandgate District Local Board of Health* v. *Keene* does not contain any expression extending the right to any case except cases in which the apportionment itself is disputed; the other judgments do contain expressions which are consistent with an intention to hold that the right extends to every dispute on any subject; but I think it is implied that there must be a dispute of the apportionment—that is, a dispute, on whatever ground, of the proportion which

(1) [1892] 1 Q. B. 831.

the party is called upon to pay. If that proportion is questioned, as a matter of proportion, on any ground, whether of fact or of law, there must be arbitration. I think that the governing words in the judgment of Lord Justice *Fry* are, "All disputes that may arise as to the proportion to be borne by the owner"; and that the judgment of Lord Justice *Lopes* also assumes a dispute of the apportionment; and this construction seems to me to be required by the very terms of the section.

For these reasons, I think the defence on this ground fails; and, as all other objections are given up, the Plaintiffs are entitled to the usual declaration, with the costs of the action.

H. B. H.

C. A

The Defendant appealed. The appeal came on for hearing on the 8th of June, 1893.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Appellant:—

The notice given by the Appellant, although expressed in general terms, was intended as a notice of objection to the apportionment, and not merely to the extravagance of the prime cost; and it was so treated by the corporation. They cannot, therefore, recover the apportionment without an arbitration. The case is covered by *Sandgate District Local Board of Health* v. *Keene* (1).

Everitt, and *Lewis Coward*, for the Plaintiffs:—

The terms of the Appellant's notice are quite clear. It was only an objection to the prime cost. The Defendant wanted to go to arbitration on a point which the arbitrator had no jurisdiction to entertain: *Cook* v. *Ipswich Local Board of Health* (2); he could enter into nothing but apportionment and frontages: *Midland Railway Company* v. *Watton* (3). The claim of the urban authority is not barred by time: *Hornsey Local Board* v. *Monarch Investment Building Society* (4): twelve years not having elapsed since the works were done.

Swinfen Eady, in reply.

(1) [1892] 1 Q. B. 831.
(2) Law Rep. 6 Q. B 451.
(3) 17 Q. B. D. 30.
(4) 24 Q. B. D. 1.

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v. LADD

LINDLEY, L.J. :—

This is an appeal by Mr. *Brooks* against a judgment of Mr. Justice *Wright*, declaring a certain apportionment charge of paving a charge upon certain houses which belonged to him.

The question before us is reduced to an extremely narrow one, and has assumed a shape totally different from that which it assumed before Mr. Justice *Wright*. Looking back at the pleadings we find that a variety of important defences were raised by the Defendant, and amongst them is the one that alone is now relied upon before us—viz., that this action is premature, and is not sustainable by reason of a notice given by the Defendant disputing the apportionment.

The point turns upon the construction of the *Public Health Act*, 1875, s. 150. I will first read that section, which shews what has to be done, and I will then shortly point out what was done. Sect. 150 gives power to the urban sanitary authority to give notice to the persons who are popularly and with sufficient accuracy called "the frontagers" to pave the streets on which their premises abut. Then it goes on: "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses." Notice was served by the Plaintiffs, who are the urban sanitary authority, upon Mr. *Brooks* and other people, requiring them to pave and make good certain streets, and there is no question about the validity of those notices. These notices not having been complied with, the corporation did the work, and afterwards sent out notices of apportionment to the persons among whom the expense was to be apportioned. Mr. *Brooks* disputed what I will refer to as "the apportionment." He did that by a letter, dated 3rd March, 1885, which, if it had been treated as an insufficient notice of

objection to the apportionment might, I think, have been properly so treated; because it is, to say the least, extremely ambiguous in its terms, and seems to refer not so much to the apportionment of the sum to be paid as to the propriety of the sum itself. "Dear Sir,—I beg to give notice of my objection to the accounts rendered," being the accounts of the sum to be apportioned, and of the actual apportionment of such sum, "and call your attention to the same. The cost is greatly in excess of the cost per foot as given to me previous to the work being done, as I find that in other cases a smaller charge has been made." If the urban authority had said, "We will not treat that as notice of objection to apportionment, and it is not so," I think they would have been perfectly within their rights; but instead of so treating it, they treat it as good notice of objection to apportionment, and they answer it by a letter of the 6th of March, 1885. [His Lordship read that letter.]

In that letter they treat Mr. *Brooks's* letter as a notice of objection to the apportionment, and as a notice which would lead to arbitration. That is followed by a letter of the 10th of March, signed by Mr. *Brooks*, which looks the other way. "In reply to yours of the 6th inst. I find that Mr. *Hart's* executors are deciding first whether the road called *Muddy Lane* ought not to be paid for by Earl *Radnor*. And after that, or in the interval, I will arrange to meet Mr. *Conquest* upon the question of prime cost of work" That was followed by a circular which I will read, issued, and sent not only to Mr. *Brooks*, but to other people who had raised objections to these charges. [His Lordship read the circular, which is given above.]

It appears that attempts were made to settle the dispute without litigation in answer to that circular. The attempt, so far as Mr. *Brooks* was concerned, led to nothing; and on the 6th of January, 1886, there is a very remarkable minute of a special and monthly meeting of the corporation. [His Lordship read the above minute of that date.]

Before I comment on that, I will pass on to the minute of the 19th of March, which runs thus: "Mr. *Fearon* stated that he appeared for Mr. *Brooks* and in support of the objections raised

C. A
1893
MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v LADD
Lindley, L.J

by Mr. *Ladd*, and that Mr. *Brooks* repudiated his liability altogether in respect of the *Muddy Lane* improvements, on the ground that the road had been a public highway for over forty years." Mr. *Brooks* now in substance says: "Whatever objection might have been taken to my original letter of the 3rd of March, the corporation have treated it and accepted it as a sufficient notice of objection to the apportionment," and the minute of the 6th of January, 1886, shews plainly that down to that time they treated it as a valid and proper and unobjectionable notice, and resolved to take action upon it upon that basis. He has got in that respect a strong case made for him by the act of the Plaintiffs themselves. The Plaintiffs have also a very strong case. They say that what Mr. *Brooks* was disputing was not the apportionment or anything else which the arbitrator would have jurisdiction to decide; but that what he wanted to contest was something which could not be properly referred to arbitration; that on the 19th of March, 1886, Mr. *Fearon* stated that Mr. *Brooks* disputed his liability altogether, and after that there was no good in going to arbitration. I confess I was very much struck with that, but I think it would be going too far to give effect to it. It is consistent even with that last minute of the 19th of March, 1886, and with Mr. *Fearon's* contention that there were several matters which Mr. *Brooks* wanted to dispute, some which the arbitrator could not deal with, and which I think were the main ones; but another, viz., the apportionment and the amount of frontage with which the arbitrator could deal. I am disposed to agree with Mr. *Eady* that a notice is not bad because it may be given for a bad reason, and the bad reason may have been expressed in it. Therefore I have come to the conclusion that Mr. *Brooks* is entitled to stand upon his notice, inasmuch as the corporation have accepted it as a good notice, and gone upon it as a good notice, and that this action therefore is premature, and cannot be supported. It follows that the order which Mr. Justice *Wright* has pronounced must be discharged, and it also follows that Mr. *Brooks* must have his costs of this appeal, but I am not disposed to give him any costs of the action. The judgment in the action will be for him without costs.

LOPES, L.J.:—

To this action various defences were raised. Every one of those defences failed or was abandoned, except one plea which raised the defence, that the action would not lie as there had been a dispute which should have been referred to arbitration under sect. 150 of the *Public Health Act*, 1875. The material words of that section as applicable to this case are these: "In case of dispute." Those words, according to the authorities, beyond all question refer to disputes as to the proportion of expenses that shall be borne by the owners. That being so, the question here is, was there a dispute as to the apportionment, or, in other words, as to the proportion of the expenses to be borne by each respective owner? That entirely depends, to my mind, upon certain letters and certain correspondence, and also upon the documents to which I will refer. It appears to me that, having regard to those documents, it is impossible to say that the Mayor and Corporation of *Folkestone* did not regard this as an objection made by Mr. *Brooks* to the apportionment. Therefore, it appears to me, it is impossible to say there was not a dispute as to the amount of the proportion of expenses which had to be borne by Mr. *Brooks*.

If we had only to deal with the letters written by Mr. *Brooks* on the 3rd of March and the 10th of March, 1885, I should think the case made by him a very weak one, and that the Mayor and Corporation of *Folkestone* would be entitled to succeed. But there is a letter of the 6th of March which is written by Mr. *Harrison*, the town clerk, in which he says, "I beg to acknowledge the receipt of your letter of the 3rd inst., giving me"—what?—"notice of your objection"—to what?—"to the apportionments made upon you by the surveyor in respect of these improvements." Now, it seems to me, that if there was nothing further, this letter would have gone a considerable way to shew the sense in which the corporation understood the nature of the objection taken by Mr. *Brooks*. But then there is the circular which was served upon Mr. *Brooks*. [His Lordship read the material parts.] That is strongly confirmative evidence that the mayor and corporation regarded this as a dispute with regard to the proportion of expenses to be borne by Mr. *Brooks*. Then we

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v. LADD
Lopes, L.J.

come to a stronger document still, viz., the minute of the 6th of January, 1886, and, to my mind, this clinches the matter as to the understanding of the corporation. [His Lordship read the minute.] Then as to the subsequent minute of the 19th of March, 1886, which is relied on by Mr. *Everitt*, it appears to me to be plain that what Mr. *Fearon*, who appeared for Mr. *Brooks*, meant was this: "Mr. *Brooks* does not relinquish or in any way abandon his objection to the apportionment; but over, above, and beyond that, he says he is not liable at all." I think, therefore, that the minute of the 19th of March, 1886, does not destroy the effect of the letters, the circular, and the previous minutes to which I have already alluded. It seems to me, the corporation accepted the notice that had been given them as a good notice of a dispute by Mr. *Brooks* in respect of the proportion of the expenses which was to be borne by him. I think therefore the appeal succeeds.

A. L. SMITH, L.J.:—

This is an action by the urban sanitary authority of *Folkestone*, represented by the mayor, aldermen, and burgesses of the borough, to recover from Mr. *Brooks* a sum of over £200 as his portion of the expenses of paving and sewering certain streets of which it is alleged he is a frontager. These works were executed as long ago as 1884. No arbitration was resorted to. At length in 1892 this action is brought to recover this sum, and Mr. *Brooks* sets up every imaginable defence which a Defendant could place upon the record, amongst which was this, shortly stated, that arbitration as regards apportionment was a condition precedent to the maintenance of the action. All the other defences, one particularly, whether this way had or had not been a highway repairable by the inhabitants at large, were abandoned when the case came to trial before Mr. Justice *Wright*, and the sole question which my brother *Wright* was to determine was whether or not there had been a dispute as to the proportion of these expenses to be borne by Mr. *Brooks*, and whether Mr. *Brooks* had given a written notice of such dispute to the Corporation of *Folkestone*. This case has taken, as cases often do on the second hearing, a turn which it did not take

when before the Judge of first instance, and for some time I was of opinion that Mr. *Brooks* had not given the requisite notice disputing the apportionments. If only his letters to the corporation were read it would appear that he had not done so. But it also seemed on reading the letters from the corporation to him that he had done so, because they accepted his letter as if it had been a notice in writing disputing the apportionment. I thought for some time that those letters might be explained if written by a clerk who did not know the law about which he was writing, but when we come to the minute of the 6th of January, 1886, which does not seem to have been pressed upon my brother *Wright*, and only came out at the close of the argument before us, the matter seems past controversy. There at a set meeting of the corporation the whole matter was discussed upon the basis that Mr. *Brooks* had duly disputed the proportion which had been assessed upon him by the surveyor, and what is more the corporation actually go so far as to appoint Mr. *Latham* as surveyor to arbitrate in that matter. It seems to me, after that, it is perfectly impossible to say that the condition precedent of giving a proper notice in writing disputing the amount of the apportionments had not been performed. It is a technical defence, but I do not see my way out of it. I wish I could, because I have a strong opinion that the real substance of Mr. *Brooks'* dispute was what Mr. *Fearon* stated and which appeared in the minute of the 19th of March, 1886, that he was not liable to pay because the road was a highway repairable by the inhabitants at large, and therefore the frontager could not be fixed with costs for sewering and paving. I am of opinion, therefore, that the appeal should be allowed, but without costs in the Court below.

H. C. J.

MAYOR, &c., OF FOLKESTONE *v.* LADD.

This was a similar action against another owner of premises abutting on *Muddy Lane.*

Within three months after receipt of the notice of apportionment the Defendant sent the following letter to the town clerk:—

"In reference to the notice of apportionment of expenses for

C. A.
1893
MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS
SAME v. LADD

the making good of *Muddy Lane*, dated February 19th, 1885, and containing a claim upon me by the urban authority of the borough of *Folkestone* for the sum of £64 1*s.* 3*d.*, I hereby give you written notice, that I object to the claim so made, and shall be prepared to dispute the same."

At the trial the Defendant abandoned all defences except that founded on this notice of objection.

Everitt, Q.C., and *Lewis Coward*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Defendant.

WRIGHT, J.:—

I think this notice of objection is sufficient. This is a notice of dispute as to the apportionment, and until the Plaintiffs have gone to arbitration there is no debt for which they can sue. The action must be dismissed with costs.

H. B. H.

Solicitors: *A. R. & H. Steele*, agents for *W. G. S. Harrison* Town Clerk, *Folkestone; Bower, Cotton, & Bower*, agents for *H. Bradley, Folkestone.*

H. C. J.

C. A.
1893
KEKEWICH, J.
May 2.
C. A.
June 14.

ATTORNEY-GENERAL *v.* HATCH.

[1893 A. 420.]

Building Line—Taking Down House—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 155.

The owner of a house in a street took out the front wall of the ground and first floors, and removed the first-floor, with the view of turning the two lowest storeys into one lofty shop, which was also to be extended behind the house. The second-floor was not disturbed, but was shored up with timber, which was afterwards replaced by iron girders and brick piers. Shortly after the erection of the iron girders and piers had been completed the urban authority prescribed a building line under the *Public Health Act*, 1875, s. 155, and commenced an action to restrain the owner from building in front of it:—

Held, by *Kekewich*, J., that the house had been substantially taken down, and that the powers of sect. 155 arose; but that the urban authority

had not prescribed the line in due time, and could not prevent the Defendant from maintaining the building he had erected:

Held, by the Court of Appeal, that, inasmuch as a substantial part of the house and of its front wall was left standing, neither the house nor the front thereof had been taken down within the meaning of sect. 155, and that the power to fix a building line had never arisen.

THIS was a suit by the Attorney-General, at the relation of the Corporation of *Richmond* (*Surrey*) and by the corporation, to restrain the Defendant, the lessee of 65, *George Street, Richmond*, from erecting any house or building on the site of No. 65, *George Street*, otherwise than in accordance with the building line prescribed by the council of the borough.

The Defendant's house was originally a brick house fronting to *George Street*, and had two floors besides the ground-floor; also a basement and cellarage below the ground-floor. The three floors were of nearly equal height, a little less than 8 feet from floor to ceiling. The front towards *George Street* was bounded at the top by a horizontal parapet. The ground-floor had been used as a baker's shop, and behind it was a bakehouse. The Defendant was desirous of making the premises into a good milliner's shop by throwing the ground-floor and first-floor into one lofty room, which was also to be carried back over the site of the bakehouse. The Defendant, in December, 1892, gave notice to the corporation of his intention to commence the proposed alterations, and leave was given him to set up a hoarding "during alterations of shop front." Negotiations thereupon took place between the corporation and the Defendant's solicitors as to the proposed new line of frontage, but without any definite result. The Defendant then gave his orders for the alterations to be proceeded with. He had the front wall of the ground-floor and first-floor rooms removed down to the street level, leaving the side walls and the front wall of the basement standing, the second-floor and its front wall being propped up temporarily by timber supports, for which permanent brick piers and iron girders were afterwards substituted. This substitution was effected and completed by the 17th of February, 1893. The second-floor rooms remained unaltered.

On the 1st of March the council of the borough, acting as the sanitary authority, held a meeting, of which the requisite four

C. A.
1893
ATTORNEY-GENERAL v. HATCH.

days' notice had been given, and passed a resolution stating that the house No. 65, *George Street*, having been taken down in order to be rebuilt or altered, within the meaning of sect. 155 of the *Public Health Act*, 1875 (1), the corporation acting by the council prescribed, under that section, a line as the line in which the front of any house or building to be built or rebuilt in the same situation should be erected. The line so prescribed was about 10 feet in the rear of the old frontage, and a house built according to it would have stood 10 feet back from the houses adjoining it on each side. This was a first step towards a general widening of *George Street*.

On the 2nd of March, notice of the resolution was served on the Defendant. Some correspondence and negotiation took place; but, the parties being unable to come to terms, this action was commenced, the corporation being relators and co-Plaintiffs, for an injunction to restrain the Defendant from erecting on the site of 65, *George Street*, any house or building otherwise than in accordance with the prescribed building line, and from continuing so much of the building then in erection as had been erected in front of that line.

The motion was heard before Mr. Justice *Kekewich* on the 2nd of May, 1893.

Warmington, Q.C., and *A. Glen*, for the relators, the corporation, contended that the house in question, or the front thereof, had been taken down in order to be rebuilt or altered, within the meaning of sect. 155 of the *Public Health Act*, 1875, and that the Defendant must, therefore, rebuild in accordance with the line prescribed by the corporation acting as the urban authority, who were the proper judges as to what constituted a "new building" under the Act. [They also referred to sects. 154, 156, 157, 158, and 159, and to *James* v. *Wyvill* (2).]

(1) Sect. 155: "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith." The section goes on to provide for compensation.

(2) 51 L. T. (N.S.) 237.

Renshaw, Q.C., and *A. Macmorran*, for the Defendant, contended that the corporation were too late in giving their notice under sect. 155, the front having been taken down, and a considerable portion of the alterations completed, before the notice: *Corporation of Folkestone* v. *Woodward* (1); *Newhaven Local Board* v. *Newhaven School Board* (2): also that the front had not been "taken down" within the section, since the second-floor remained intact.

KEKEWICH, J.:—

There is no little difficulty in giving such a precise meaning to the language of the 155th section of the *Public Health Act*, 1875, as is capable of being easily applied to all the different circumstances which may arise, and probably the general construction suggested in *James* v. *Wyvill* (3) is the right one, that there is an intentional vagueness because precision is impossible, and that it must be left to the discretion of the Judge or the jury, as the case may be, in each particular case, to say what amounts to a taking-down of a "house or building, or the front thereof." There are many words in the section which deserve consideration, and they must be considered with reference to other sections, particularly those which deal with the powers of the local authority likely to be exercised or intended to be exercised under this section. In the first place, the point to be observed is that everything turns on the words "taken down." The question here is whether "any house or building, or the front thereof," has been "taken down." The words "or the front thereof" do not seem to me to introduce any difficulty. A house or building may be said to be taken down where the whole of it is taken down; but it may also fairly be said to be taken down, with a view to this section—that is to say, with a view to fairly exercising the powers thereby conferred—when that part of it which immediately fronts the street in an urban district has been taken down. You would not expect to find that the taking-down of the rear of a house would call into exercise the powers thereby conferred, because it is the frontage to the street which

(1) Law Rep. 15 Eq. 159. (2) 30 Ch. D. 350.
(3) 51 L. T. (N.S.) 237.

C. A.
1893
ATTORNEY-GENERAL v. HATCH.
Kekewich, J.

is of importance; and therefore the words "or the front thereof" really only mean this, that if that particular part of the house has been taken down then the powers may be exercised. As regards the construction of the section, I do not think those words either create any difficulty or give one any guide. The guide, to my mind, is, for the present purpose, to be found in the words "in order to be rebuilt or altered." The local authority has to see whether the house or building has been taken down in order to be rebuilt or altered. If it has been taken down in order merely to clear the space, the powers do not arise; if it is intended that there should be no rebuilding, if, for example, a man having two houses is minded to pull down one and turn the site of it into a garden or court for the other, apparently the local authority could not interfere under the section, though the frontage to the street of the garden or court would remain the same. But there must be a rebuilding or alteration. That seems to me directly to point to this, that the house need not be entirely taken down. There seems to be a certain amount of absurdity in saying that the house must be entirely taken down in order that it may be altered. I do not myself understand how that meaning could be reasonably introduced into the section. What I understand "or altered" to imply is, that a house may be substantially taken down in order that a house of an altered character may be erected, and that this would allow the local authority to interfere. Obviously, the meaning is that when once the house is so far taken down that without overmuch interference with the liberty of the owner, who is to be compensated, the improvements which the local authority have determined on may be introduced, then they are to have the power of making those improvements, such as widening the street. That seems to me to be legitimate, and I certainly should not myself regard leaving the side walls, or even the back walls, as rendering it impossible or difficult to say that the house has been taken down, if in substance the house that was there before is no longer there—as long as what is intended to be put up is substantially a new house, that is to say, a house either on the same lines or a house of an altered character.

Applying that construction as well as I can to this particular

case, I think that this "house or building has been taken down, in order to be rebuilt or altered." True it is that the cellars are left, also the basement wall which runs parallel to the street and which supported the old building, and also the side walls. About this I do not feel the slightest difficulty. The difficulty is introduced by the fact that the upper storey has been ingeniously left and has been supported by iron girders placed across, so that there it is, and there at any rate for the time it remains, and it is intended to remain. It is extremely difficult to draw any line and to say whether this or that is sufficient, or what more or less would be required to prevent the house from being said to be "taken down." But one storey out of three, and that the top storey, seems to me to be a small amount to remain. The section I think points directly to the bottom part being left and not being pulled down. The 159th section I think has some little application, though it is not directly in point, because the question considered there is, What is a new building? But there is a little guide in the expression that "for the purposes of this Act the re-erecting of any building pulled down to or below the ground-floor, or of any frame building of which only the framework is left down to the ground-floor," shall be considered the re-erecting of a new building. So that I find there what I think is common sense, that if you only pull down the roof and the top storey, or even the second or third storeys, of a high house and leave the ground-floor, then that would not be a "taking down," and that is consistent with the construction I put upon the 155th section, because it would be extremely unfair and unreasonable to make a man set back his house when he has no desire to alter the ground-floor. But here there is a top storey, and that remains. Whether even that would hold good in another case, or how much more or less would make a difference, I am not prepared to say; but I think here there has been substantially a taking down of this house in order that it may be rebuilt or altered.

So far I am with the Plaintiffs, and I have expressed my opinion because it may be of importance in other cases; but I am against them on the question of time. The construction which I have put in favour of the Plaintiffs on this section is

C. A.
1893
ATTORNEY-GENERAL v. HARCH.
Kekewich, J

that the householder shall not be interfered with—that is to say, his liberty of building shall not be interfered with—except when by his own act the site is vacant, or at any rate substantially so, in order that then the local authority may step in and say, "Now, on proper compensation being paid, you, in your rebuilding or your alteration, shall conform to a line for the general improvement of the district." That seems reasonable, and seems, according to this class of legislation, a fair sacrifice of individual freedom for the benefit of the neighbourhood. But it seems directly implied that the local authority cannot exercise that power when the householder has exercised his liberty. Expressly, by the very words of the section, they cannot exercise that power until he has pulled down; and it seems to me directly implied that they cannot exercise it when he has built up or altered. About that meaning of the section I entertain no doubt; but again the difficulty is in applying it to the particular circumstances. Fortunately, here I have the guidance of the Court of Appeal in the case of *Newhaven Local Board* v. *Newhaven School Board* (1). There the Lords Justices *Cotton*, *Lindley*, and *Bowen* really expressed themselves in language so nearly the same that it may be fairly treated as identical: there was no difference of opinion between them whatever. I will take the words of Lord Justice *Bowen* (2): "I think, however, that upon the true construction of the section it would be too late to prescribe a line if what was already done in the way of building necessarily involved as a matter of construction the crossing of the prescribed line."

Now, the notice here was issued on the 2nd of March. By that time the Defendant had commenced his rebuilding or his alteration; he had done a great deal more than commence: he had already got the old side and basement walls. His top storey remained intact, and he had connected those two walls so as to form a permanent support to his top storey by means of the iron girders, and he had done some other work which completed that portion of the alteration, so that nothing more remained to be done there. And that was necessarily crossing the prescribed line, because the object of the local authority

(1) 30 Ch. D. 350. (2) 30 Ch. D. 375.

was to get that back and to gain something for the street. So he had put permanent work on the prescribed line, and he was doing that which the notice would have prevented him from doing if it had been in time.

As against that view there is really only one argument. First, it is said there was no delay attributable to the Plaintiffs. That may be so—and in *Corporation of Folkestone* v. *Woodward* (1) Vice-Chancellor *Malins'* decision went on delay. I may put that out of sight. But it is argued that there were negotiations, and that the Plaintiffs acted as soon as they could; they were obliged to give four days' notice of meeting, and they gave a four days' notice to summon a meeting to pass that resolution as soon as they possibly could. That may be so; but the negotiations do not seem to me to be of such a character as to have interfered with the liberty of the Defendant. The Plaintiffs never told him that the breaking-off of negotiations would result in the exercise of their powers. The result is that he went on, and they did not. I do not say they are to blame; but, as a matter of fact, when they issued their notice of the 2nd of March they found that done which the notice was intended to prevent. The notice under those circumstances was too late.

The motion must be refused, with costs.

G. I. F. C.

The corporation appealed. The appeal was heard on the 14th of June, 1893.

Warmington, Q.C., and *A. Glen*, for the appeal:—

We say that this house has been taken down within the meaning of the *Public Health Act*, 1875, sect. 155, and taken down for the purpose of being rebuilt or altered. It was substantially taken down, for only a small part was left standing. Mr. Justice *Kekewich* was with us on this point, but decided against us on the ground that we were too late. His Lordship relied on *Newhaven Local Board* v. *Newhaven School Board* (2). In the case of an old street the board cannot, as in the case of a new

(1) Law Rep. 15 Eq. 159. (2) 30 Ch. D. 350.

C. A.
1893
ATTORNEY-GENERAL v. HATCH.

street, prescribe a general building line; the building line for a new house cannot be prescribed till the old house has been taken down. Now, sects. 5 and 6 of the 2nd schedule to the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), require three clear days' notice of a meeting of the council to be given specifying the nature of the business to be transacted at the meeting. If, then, the houseowner pushes forward some work in the interval, and the council cannot interfere with anything done before the line is fixed, the power of sect. 155 may be readily eluded. The point did not really arise in the *Newhaven Case* (1), for all that lay beyond the building line. There was a set of annexes which had not been begun when the line was prescribed. Sect. 155 does not of itself widen the street, for it does not alter the ownership of the land. We can reach our object by means of a provisional order; but if the injunction is refused we shall have to buy the strip of the Defendant's land in front of the building line with everything that he erects upon it, instead of buying vacant ground, which is all we shall have to do if the house is set back.

Renshaw, Q.C., and *A. Macmorran*, for the Defendant, were not called upon.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, who has refused an injunction to restrain the Defendant from building beyond a line prescribed by the council of the Corporation of *Richmond* acting as the urban authority. In order to understand the case I must call attention to what the building was and what it was intended to do with it. It was a house consisting of a basement, ground-floor, first-floor, and second-floor. The ground-floor was used as a baker's shop, and there was a bakehouse behind it. The object of the Defendant was to convert the baker's shop and the bakehouse at the back into one new shop for millinery. What he proposed to do was to take out so much of the front of the house as reached to the top of the first-floor, to remove the first-floor so as to make the shop higher, and to

(1) 30 Ch. D. 350.

carry it at this height over the site of the bakehouse. It was not intended to deal with the basement nor with anything above the new shop.

The question we have to decide depends on the wording of the *Public Health Act*, 1875, s. 155. By sect. 154 of that Act urban authorities have power given them to buy land for the purpose of widening streets, but under sect. 155 powers are given them to regulate the building on land without interfering with the ownership of it, they paying compensation for any damage which may arise to the owner from their requiring his building to be set back. That section enacts that "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building or the front thereof to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith." It is conceded that this is a house situate in a street in an urban district, and the question is whether that house or the front thereof has been taken down to be rebuilt or altered. A question may be raised whether the words "to be rebuilt or altered" apply to the front as well as to the house; but the better construction is that they apply to both. In order to bring the power given by this section into operation, it must be made out that the house or the front of it has been taken down Now, can it be said that this house has been taken down? I do not say that a house might not be considered to be taken down within the meaning of this section if only a few bricks were left standing; but when a substantial portion, such as the whole top-floor, is left untouched, I think that the house has not been taken down, and I do not think that any jury would find that it has. The Defendant did not intend to take down his house, but to keep his house and alter the shop. A real substantial part of the house has been left standing, and I cannot come to the conclusion that the house has been taken down.

Then as to the front, the Defendant never intended to take down his front; he only intended to take out part of it. This is not a case of *de minimis non curat lex*; he left standing a substantial

C. A.
1893
ATTORNEY-GENERAL v. HATCH
Lindley, L J

part, about one-third of the front. The corporation never thought of proceeding under sect. 155 till they found they could not come to terms with the Defendant. Now, unless the house or the front of it has been taken down the powers given by that section do not arise. The condition has not been performed, and it is immaterial that the Defendant may have taken the course he has with a view to keep outside of the Act. I cannot agree with the view of Mr. Justice *Kekewich* that this house is to be considered as having been taken down.

This being our view of the case, the question whether the corporation were too late in taking proceedings does not arise, and I shall say no more about this part of the case than that I am not prepared to depart from the view I expressed in *Newhaven Local Board* v. *Newhaven School Board* (1).

LOPES, L.J.:—

I read the words "taken down" in sect. 155 as meaning substantially taken down. I do not mean that every brick must be taken down: each case must be judged of by its own particular circumstances as to whether the building is substantially taken down. You must look to the house as it was, compare what has been taken down with what is left, and then decide whether the house or its front has in substance been taken down. In the present case I think the house has not substantially been taken down, for a substantial part of it has not been interfered with. So as to the front, a substantial part of it remains. In my opinion, then, neither the house nor its front has substantially been taken down, and the powers of the urban authority under sect. 155 never arose. I cannot agree with Mr. Justice *Kekewich* on this part of the case. As to the question of time, I give no opinion, as it does not arise.

A. L. SMITH, L.J.:—

I agree that the powers of the urban authority under sect. 155 never arose in this case. That section cannot be brought into play unless the owner has taken down his house or the front of

(1) 30 Ch. D. 350, 370.

it. The section contains no such words as "house or part of a house," "or front or part of the front," the reason, as I apprehend, being because the Legislature did not intend the power given by the section to arise unless the whole house or the whole front of it was taken down. I agree that this means substantially taken down, and that if some small, insignificent part were left it should be held to be wholly taken down within the meaning of the section. Here the owner wanted to alter a baker's shop into a milliner's shop and show-room, and he obtained leave to set up a hoarding "during alterations of shop front." Did he take down the whole of the front of his house for that purpose? Looking at the plan and model which were exhibited, I must say that he has not; for how can a man who leaves one-third of the front of his house be said to have taken down the whole? In my opinion, therefore, the Attorney-General fails in proving that the Defendant has taken down either his house or the front of his house, within the meaning of the section, and the appeal fails.

As regards the other point, I agree with the opinion expressed by Lord Justice *Lindley* in *Newhaven Local Board* v. *Newhaven School Board* (1).

Solicitors: *Woodbridge & Sons*, agents for *F. B. Senior*, Town Clerk, *Richmond; Edell & Gordon.*

(1) 30 Ch. D. 350, 370.

H. C. J.

C. A
1893
KEKEWICH, J.
April 18.
C. A.
June 14, 15.

WHEATON *v.* MAPLE & CO.

[1893 W. 828.]

Light—Easement—Indefeasible Right—Lessee of Servient Tenement—Reversioner — Crown—Surrender—Prescription—Presumption of Lost Grant —Injunction—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 1, 2, 3.

In July, 1852, the Plaintiff purchased and took a conveyance of the freehold of a piece of land on which he had, in the same year, built two houses. In September, 1892, the Defendants, who had, in 1891, purchased a Crown lease, which had been granted in 1826 by the Commissioners of Woods and Forests under their statutory powers, of certain adjoining buildings for the residue of a term which would expire in 1914, surrendered the lease to the Crown upon the terms of an agreement with the Crown and the Commissioners that they, the Defendants, should erect new buildings in place of the old, and that, on completion, the Commissioners should grant them a new lease. The Defendants then proceeded to pull down the old buildings and erect new ones, which, the Plaintiff complained, would obstruct the ancient lights in his houses. No new lease had yet been granted to the Defendants under their agreement.

In an action brought by the Plaintiff against the Defendants for an injunction to restrain them from obstructing his ancient lights, the Plaintiff contended that he had acquired an indefeasible right to light, not only as against the Defendants as lessees, but also as against the Crown as reversioners:—

Held (affirming the decision of *Kekewich*, J.), (1.) that sect. 2 of the *Prescription Act* (2 & 3 Will. 4, c. 71) does not apply to the easement of light; (2.) that sect. 3, which applies to light, does not bind the Crown; and (3.) that under the circumstances no lost grant of light could be presumed as against the Crown or its lessees.

But *held* (reversing the decision of *Kekewich*, J.), (4.) that as the Plaintiff could not establish a right against the Crown as reversioner, he could not establish a right against the lessees, inasmuch as an easement, if acquired by prescription, either at common law or under the statute, must be absolute and not for a term of years.

Perry v. *Eames* (1) and *Bright* v. *Walker* (2) approved.

By a lease dated the 19th of August, 1826, the Commissioners of Woods and Forests, acting under the powers given them by the statute 2 Geo. 4, c. 52 (1821), demised certain freehold premises in *Osnaburgh Street, London*, to one *Ireland* for the term of ninety-nine years from the 5th of July, 1815. In 1891 the

(1) [1891] 1 Ch. 658. (2) 1 C. M. & R. 211.

Defendants, *Maple & Co., Limited,* a furnishing company in *Tottenham Court Road,* purchased the term.

By an agreement under seal, dated the 5th of September, 1892, and made between Her Majesty the Queen of the first part, the Commissioners of Woods and Forests of the second part, and the Defendants (thereinafter called "the contractors") of the third part (being an agreement for taking down the old buildings on the said premises and erecting new ones): after reciting that the Crown was seised of the inheritance in fee simple of the said premises subject to the lease of 1826: It was mutually covenanted by the Commissioners, in exercise of the powers of the Acts 10 Geo. 4, c. 50, and 14 & 15 Vict. c. 42, and with the authority of the Commissioners of the Treasury, and on behalf of Her Majesty, and by the contractors, as follows: (1.) that the contractors would, before or on the execution of the present agreement, cause and procure the lease of 1826 to be surrendered to Her Majesty free from all underleases, except an underlease granted by *Ireland,* the original lessee, for a term of years expiring in 1914: (7.) that the contractors should be responsible for all damage occasioned by the pulling down of the old buildings, or by the execution of the works thereby agreed to be performed, and also should be subject to all claims with respect to rights of air, light and all other rights that any person might lawfully claim in regard to the said premises. Then the agreement went on to provide for the pulling down of the old buildings, and the erection of new ones on the site thereof, and further to provide that, on the Commissioners being satisfied of the erection of the new buildings in carcase, they, the Commissioners, would grant to the contractors leases of the several parts of the premises for two terms respectively of eighty years and twenty-two years from the 5th of July, 1892, at the rents therein mentioned; the contractors covenanting in the meantime to perform all the covenants by the present agreement agreed to be contained in such leases as if actually granted.

By a deed of even date with the agreement the Defendants surrendered the lease of 1826 to the Crown, "to the intent that the term of years thereby created might be merged and extinguished in the reversion of the said premises then vested in

C. A
1893
WHEATON
v
MAPLE & Co

Her Majesty in right of her Crown." Under the agreement the Defendants had commenced erecting new buildings, but no lease had yet been granted to them, the buildings not being sufficiently advanced. It appeared that the land comprised in the agreement and in the lease of 1826 had belonged to the Crown for upwards of 200 years prior to the date of the agreement.

In March, 1852, the Plaintiff entered into an agreement in writing to take a building lease, on certain specified terms, of certain premises adjoining, in the rear, the Defendants' premises. Having completed the buildings under that agreement, he, in July, 1852, purchased the freehold, which was thereupon duly conveyed to him. Finding that the new buildings which the Defendants were erecting under their agreement would, if completed, obstruct certain windows in his houses, now called Nos. 8 and 9, *Diana Place, Euston Road*, which he claimed to be ancient lights, he commenced the present action, and now moved for an interim injunction, to restrain the Defendants from erecting any building on their land so as to obstruct his ancient lights. The fact that the Plaintiff's windows were "ancient lights" was not disputed. By consent the hearing of the motion was treated as the trial of the action.

The motion was heard before Mr. Justice *Kekewich* on the 18th of April, 1893.

Marten, Q.C., and *Boome*, for the Plaintiff:—

We submit that we have a good claim by prescription under both sects. 2 and 3 of the *Prescription Act* (2 & 3 Will 4, c. 71) (1),

(1) Sects. 2 and 3 of the *Prescription Act* (2 & 3 Will. 4, c. 71), are, so far as is material, as follows:—

"2. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors . . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed

for under sect. 3 we have enjoyed an undisputed right to light for at least twenty years as against the Defendants or their predecessors as lessees; and under sect. 2 we have also acquired an indefeasible right by enjoyment for forty years—that is, since 1852—as against the Crown as reversioners. It is clear that a right to light, when acquired against a lessee, is acquired also against the reversioner: *Simper* v. *Foley* (1). There is ground for contending that sect. 2 includes light: *Dalton* v. *Angus* (2); *Bass* v. *Gregory* (3); though Mr. Justice *Chitty*, in *Perry* v. *Eames* (4), appears to have been of a different opinion. But, independently of the statute, we claim against the Crown on the ground of a presumed grant: *Goodtitle* v. *Baldwin* (5); *Roe* v. *Ireland* (6).

[KEKEWICH, J.:—That in a proper case a lost grant may be presumed against the Crown is established by *Goodman* v. *Mayor of Saltash* (7).]

Warmington, Q.C., and *Ingle Joyce*, for the Defendants:—

The result of holding that sect. 2 relates to light as well as sect. 3 would lead to the absurdity that there are two separate periods, forty years and twenty years, each giving a right which "shall be deemed absolute and indefeasible." The true construction of sect. 2 is, that it does not include light, which is a matter dealt with by sect. 3 alone: *Perry* v. *Eames* (8). The fact is that the two sections deal with different subjects, and this is shewn by sect. 4. Sect. 2 deals with the enjoyment of an

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absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

"3. When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(1) 2 J. & H. 555.

(2) 6 App. Cas. 740, 764, 798; 3 Q. B. D. 85, 93.

(3) 25 Q. B. D. 481, 483.

(4) [1891] 1 Ch. 658.

(5) 11 East, 488.

(6) Ibid. 280, 284.

(7) 7 App. Cas. 633.

(8) [1891] 1 Ch. 658, 686.

C. A
1893
WHEATON
v.
MAPLE & Co.

easement "as of right," that is, with an enjoyment that is open and notorious, and not had by stealth: *Tickle* v. *Brown* (1). It may be doubted whether there can be an enjoyment of an easement of light at all as of right within that decision. As to presuming the grant of an easement, such a presumption cannot be made against a landlord not in possession and ignorant of the fact: *Daniel* v. *North* (2). And the facts here do not justify the presumption of a grant, for the Plaintiff cannot prove any right prior to 1852; to presume a grant, it is necessary to go further back than that: *Winterbottom* v. *Lord Derby* (3). Moreover, the Commissioners of Woods and Forests, on behalf of the Crown, could only grant leases, and act generally, under their statutory powers, the exercise of which must always be a matter of record; and, therefore, no such grant of an easement as is contended for ought to be presumed as against them.

Again, the claim is against us as lessees, but our lease, and consequently our liability under it, came to an end by virtue of the surrender in September, 1892; and now we are merely in the position of licensees from the Crown.

[They also referred to *Harris* v. *De Pinna* (4).]

Marten, in reply:—

As to the surrender, the property was, under the lease, undoubtedly bound. The lessees cannot, by surrender, destroy the right we have acquired, or, by a new mode of occupation, deal with the property in a manner inconsistent with our indefeasible right.

KEKEWICH, J.:—

There is no question here about the fact of ancient lights. The facts of the case are sufficiently clear. In March, 1852, the Plaintiff entered into an agreement for taking this land on a building lease the terms of the lease being set out, as is usual, in the document itself; and it contains no provisions for his purchase of the freehold. Having, however, erected the buildings under the original agreement, he then, in July following,

(1) 4 Ad. & E. 369.
(2) 11 East, 372.
(3) Law Rep. 2 Ex. 316.
(4) 33 Ch. D. 238.

took a conveyance of the land with the buildings so erected on it; and his affidavit may be taken to be accurate—that the buildings were completed as they now stand, at any rate as regards the openings for light, in July 1852. That gives us more than forty years before the issue of the writ in this action. So that, if the argument on the second section of the *Prescription Act* is well founded, we have the forty years during which the title would run in favour of the Plaintiff.

It is said that, by virtue of the 2nd section of the *Prescription Act*, he is entitled to a right of light irrespective of his claim under the 3rd section. It is important for him to make that point, because the 2nd section, as well as the 1st, expressly concludes the Crown, whereas the 3rd section makes no mention of the Crown. It may very likely be that the omission of the Crown from the 3rd section is due to the frame of the sentence. The 1st section says: "that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of our Sovereign Lord the King," and so forth, shall be defeated after thirty years' enjoyment by shewing the commencement. The words "any land" naturally brought in the mention of the Crown as a possible landowner; and the phrase which is substantially the same in the 2nd section "to be enjoyed or derived upon, over or from any land or water of our said Lord the King," comes in, in its natural sequence. The 3rd section, on the other hand, is framed in an entirely different way, and there is no word suggestive of the mention of the Crown, or, indeed, of any person at all, because the right is thereby made absolute and indefeasible.

Now, apart from the 3rd section, to which I will come by-and-by, the 2nd section does contain words concluding the Crown, and it is important, therefore, for the Plaintiff to shew that the easement he is now claiming—that of light—is within that section. So far as I am aware, there has never been any decision to that effect. I think there are several answers to the argument that an easement of light comes within the 2nd section. It is difficult to suppose that the Legislature, in making a special provision in respect of light by the 3rd section, should have

C. A.
1893
WHEATON
v.
MAILE & CO.
Kekewich, J.

meant to deal with it also in the 2nd section, and that notwithstanding the very general words in that section, "any way or other easement." That by itself is, I think, a strong argument. But, without going further, the argument which was put forward by Mr. *Warmington* is, I think, destructive. If the Plaintiff's point is a good one, you have this—that by the 3rd section, which is expressly devoted to light, and to light only, that easement is made absolute and indefeasible at the expiration of twenty years' uninterrupted enjoyment; and yet, under the 2nd section, for some purposes there is another right accruing at the expiration of forty years. How an absolute and indefeasible right which becomes absolute and indefeasible at the end of twenty years can be any greater or be different at the end of forty years, it is difficult to conceive; and there is really only one answer—that it is so at the end of forty years against the Crown under the 2nd section, whereas under the 3rd it is absolute and indefeasible against any person at the end of the twenty years, but does not affect the Crown.

That was the precise point Mr. Justice *Chitty* had to deal with in *Perry* v. *Eames* (1), and he expressed a distinct opinion that the 2nd section did not affect this particular easement of light. There really is no authority the other way. In the passage quoted from Lord *Selborne's* speech to the House of Lords in *Dalton* v. *Angus* (2), what he was dealing with was the right to support, and his reasoning was directed to shew that the words "or other easement," in sect. 2, included the easement of support; but there is no critical examination of the language of the section directed to shew that it included light, and indeed there is no decision at all upon the point.

The only other case to which I have been referred is the case before Mr. Baron *Pollock*, of *Bass* v. *Gregory* (3). All he says there is, "If it were necessary for me to decide that point"—whether the 2nd section only applies to rights of way and water—"I should certainly prefer to adopt Lord *Selborne's* view in *Dalton* v. *Angus*." I am sure I am not wanting in respect to the learned Baron when I say that I am not bound to consider, and

(1) [1891] 1 Ch. 658, 666. (2) 6 App. Cas. 740, 798.
(3) 25 Q. B. D. 481, 483.

do not consider, that expression of his as meaning to give a definite opinion on the point. To my mind, uncontrolled by authority, it is reasonably clear that the 3rd section only is devoted to light, and that the general words of section 2 do not extend to that particular easement.

Putting, then, the 2nd section out of the way, I have to consider the rights under the 3rd section. These Defendants have, without interruption—unless the surrender is to be deemed an interruption—by themselves and their predecessors, occupied the premises which they now occupy for a considerable period—namely, from 1826 to the present time, and this Plaintiff has enjoyed an easement of light for twenty years and more—namely, from 1852, onwards, and in fact without any interruption at all from July, 1852 to the 5th of September, 1892. So that, as against the Defendants, if that were all, the easement of light has been obtained, and it is an absolute and indefeasible right under sect. 3. But the difficulty lies in this, that the Defendants are the lessees of the Crown, or, it is said (if there is any distinction), at the present moment the licensees of the Crown; and the question arises because the Crown are the reversioners. The ordinary law is beyond dispute, that, by obtaining an absolute and indefeasible easement of light as against a lessee, you obtain it also against the reversioners, notwithstanding the reversion may be in settlement, or otherwise in the hands of limited owners. When once the twenty years has run its full course, then the right is absolute and indefeasible, and no person can come in and interfere with it at all.

That is, of course, the explanation of many applications which are made to the Court by reversioners, pending leases; the ground being that, unless the Court interferes, their property will be gone—that is to say, they will find themselves, at the termination of the lease, in the possession of property affected by an easement. About that there has not been, and could not be, any question; but against that it is said, this is a lease from the Crown, and, though you can by the words of the statute bar the reversioner who is capable of being barred, you cannot bar the Crown, who is incapable of being barred, because the Crown, not being mentioned in the 3rd section, is, according to the

C. A.
1893
WHEATON
v.
MAPLE & Co.
Kekewich, J.

common interpretation of the statute, not bound by the enactment, and therefore is entirely outside it. That, I think, is the right view—that the Crown cannot be bound. The result is that, though the enjoyment of this right for twenty years is conclusive against the lessees, and conclusive against their capable lessors, a term which includes limited owners, persons under disabilities, and so forth, it is of no avail at all against the Crown, who are not bound by the statute.

The Plaintiff endeavours to get out of that by saying, "I fall back on the common law right of prescription, independently of the statute: there ought to be a presumption of a lost grant going back these many years, and I may have the benefit of that presumption against the Crown." No doubt there can be presumption of a lost grant against the Crown; that is established by many cases, and especially, I think, by the case of *Goodman* v. *Mayor of Saltash* (1). Ought I, in this particular case, to make that presumption? I think not, for two reasons. In the first place, this is a modern case, and I am not dealing here with what may be supposed to have happened a great many years ago. What has happened, if it has happened at all, took place since 1852. Before that there could not have been a grant, because there were no lights to be protected. It must date from 1852. There is no reason why one should not, in 1893, presume a grant in 1852, or later than that if the facts allowed it; but here I am dealing with the Crown acting under certain statutes, and through the Commissioners of Woods and Forests, who possess statutory powers; and I cannot regard the Crown for this purpose as an ordinary reversioner, or an ordinary owner of land, competent to do whatever that owner pleases. The Commissioners have certain statutory powers. It may be true, as Mr. *Marten* argues, that the Commissioners might have granted such an easement as this. It is quite another thing for the Court to conclude that they have in fact done so, or that they have endeavoured to do so. To begin with, one must in matters of presumption, which are really questions for a jury on the facts, regard all the circumstances; and one must regard, I think, this circumstance, that the Commissioners of Woods and Forests,

(1) 7 App. Cas. 633.

acting under statutory powers, act in a formal way, and that what they do is matter of record; so that, if there had been any grant of this kind, it would, no doubt, have been recorded. Dealing with persons like the Commissioners of Woods and Forests, I think it would be wrong to go in the teeth of what one is aware is the practice of this body, and presume a grant. That is enough; but there is another ground—namely, that put so strongly in the case of *Daniel* v. *North* (1). What is said by Lord *Ellenborough* is this (2): "How can such a presumption be raised against the landlord, without shewing that he knew of the fact, when he was not in possession, and received no immediate injury from it at the time. That point was not put to the jury. The impression on our minds is founded upon the general principle, that a grant will not be presumed against an ignorant man, not in possession at the time of that which is to give him knowledge of the fact, and from whence knowledge would be presumed." Mr. Justice *Bayley* puts it in the same way (3). I am far from saying that it would not be right in a proper case to make a presumption against the reversioner. I do not think either Lord *Ellenborough* or Mr. Justice *Bayley* meant to say that you cannot make a presumption against a man who is not in possession; but when you have a man who is not in possession, and who cannot be supposed to see what is going on, and is not shewn to be affected by any knowledge of the acts likely to cause the injury to his property, I do not think you ought to make the presumption. On all those points I am against the Plaintiff.

But there remains this point behind, Is he not entitled to restrain these Defendants? The right acquired against the lessee being, as I have already mentioned, binding as against the competent or capable lessor, is not the less binding against the lessee because it is also binding against the lessor; and, if the Defendants were still in possession under the lease of 1826, I fail to see any argument which would hold good to allow them to block up these lights, which they have by their acquiescence for twenty years and upwards converted into an absolute and indefeasible right as against them. It is a grant by them by

(1) 11 East, 372. (2) 11 East, 374.
(3) 11 East, 375.

C. A.
1893
WHEATON
v.
MAPLE & Co.
Kekewich J.

virtue of the statute. They are to be taken as having given as much as they are capable of giving. They cannot bind the reversion if the reversion is not vested in a person or corporation capable of being bound; but the policy and meaning of the statute is that they themselves must be taken to have made as large a grant as they are capable of making. But, say the Defendants, "in September, 1892, we surrendered that lease, and we have now really no lease at all; probably we shall have one by-and-by, but in the meantime we are only in possession as licensees with the prospect of a lease, therefore there is a dividing line made by that surrender, and the right of the Plaintiff as against us was gone when the lease came to an end." I am not much pressed by that. If it were necessary, I think it could be fairly held that the lessees could not, by surrender of the lease, defeat a right once acquired against them. That comes within the authority of such cases as *Piggott* v. *Stratton* (1), a very well known case, where a man tried to prevent a view of the sea being kept open by surrendering the lease on which the covenant depended. But I think the case here may be put more simply than that. This is not a surrender for the purpose of determining the lease: it is a surrender by the lessees merely for the purpose of renewing their occupation under different terms and conditions; and, more than that, they must be presumed to have made a grant for the whole term of the lease. If they were ejected for breach of covenant, or if the lease came to an end by some operation of law, or in any other way, that might be a good answer to the Plaintiff; but I do not think that a man can be heard to say, "I have granted you by what I have done, or otherwise, a right to the enjoyment of these lights over my buildings and during my lease as far as the lessee can be bound; but I have surrendered that, and therefore, though I am still in occupation, you shall not have any longer enjoyment of the easement." Whatever might be the case as against a stranger coming in derivatively, it seems to me that as against the Defendants themselves the Plaintiff's title must remain good notwithstanding the surrender. Therefore on that ground, though I am against the Plaintiff on all other grounds, and

(1) 1 D. F. & J. 33.

entirely against him as binding the reversion, I think that, as against the Defendants, the Plaintiff is entitled to relief for a disturbance of his enjoyment of these lights.

There must be a declaration to this effect, that during the term granted by the original lease, which would expire in 1914, the Defendants were not and are not entitled to erect any buildings so as to obstruct the ancient access of light to the injury of the Plaintiff. And then there must be an injunction restraining the Defendants from erecting any building of that character, and a reference to Chambers to assess the damages occasioned by the erection of the Defendants' building up to the present time.

G. I. F. C.

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From this judgment the Defendants appealed. The appeal was heard on the 14th of June, 1893.

Warmington, Q.C., and *Ingle Joyce*, for the Appellants:—

The Plaintiff has no right against the Crown or anybody claiming under the Crown. The contention of the Plaintiff that a lost grant can be presumed is preposterous as to buildings erected in 1852. He must rely on the statute only. The Court below held that the Plaintiff had a right against the Defendants, though not against the Crown. But that cannot be, for this is not a case of a personal right: if an easement of light is established it is an absolute and indefeasible right, and is good against the servient tenement in whatsoever hands it may be. The section which relates to light is sect. 3, in which the Crown is not named; therefore the right cannot have been acquired under that section. In sect. 2 the Crown is named; but it was decided long ago in *Webb* v. *Bird* (1) that negative easements are not within that section, and *Perry* v. *Eames* (2) decides that light is not within it. No doubt, when property is let, a right by an adjoining proprietor to access of light over it is gained by twenty years' user, and the reversioner is bound; but that is between subjects. The title to light, if conferred at all, is an absolute title, and if the property is so circumstanced that the claimant

(1) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841. (2) [1891] 1 Ch. 658.

C. A.
1893
WHEATON
v.
MAPLE & Co.

cannot get that, he gets nothing: *Bright* v. *Walker* (1); *Perry* v. *Eames* (2).

Marten, Q.C., and *Boome*, for the Plaintiff:—

Under sect. 3 of the *Prescription Act* the Plaintiff has acquired a right against the Defendants, the lessees; and if the Crown has any special rights, the agreement between the Commissioners and the Defendants, under which the Defendants undertook all obligations as to rights of light and all other rights, shews that the Crown did not intend to insist on its special privilege. At all events, the Plaintiff's right against the Defendants during their term is indefeasible: *Shelford's* Real Property Statutes (3); *Frewen* v. *Philipps* (4); *Beggan* v. *M'Donald* (5); *Fahey* v. *Dwyer* (6); *Harris* v. *De Pinna* (7); *Mitchell* v. *Cantrill* (8); *Robson* v. *Edwards* (9).

[LOPES, L.J., referred to *Daniel* v. *Anderson* (10).]

It is well established as a general rule of law that a right by prescription against the termor binds the reversioner: *Simper* v. *Foley* (11); and it can make no difference, while the term lasts, if the reversioner has a special privilege which exempts him from the rule. The surrender of the lease could not destroy the rights which had been previously created. The Plaintiff is in the same condition as if the lessees had granted the right during the existence of their term.

In the second place, we say that a grant from the Crown will be presumed. When the right to light has been enjoyed for twenty years the Court will treat it like any other easement, and not admit evidence as to the origin of the right: *Bass* v. *Gregory* (12).

But we also contend that light is included in sect. 2, the words of which are quite general, as well as in sect. 3; and sect. 2 expressly binds the Crown: *Dalton* v. *Angus* (13). Moreover, sect. 3

(1) 1 C. M. & R. 211, 220.
(2) [1891] 1 Ch. 658.
(3) 9th Ed. p. 9.
(4) 11 C. B. (N.S.) 449.
(5) 2 L. R. Ir. 560.
(6) 4 L. R. Ir. 271.
(7) 33 Ch. D. 238, 251.
(8) 37 Ch. D. 56.
(9) [1893] 2 Ch. 146.
(10) 31 L. J. (Ch.) 610.
(11) 2 J. & H. 555.
(12) 25 Q. B. D. 481.
(13) 6 App. Cas. 740, 798.

binds the Crown by implication. That section is ancillary to sect. 2, and there is no inconsistency between the two sections. Under one section or the other the Plaintiff has acquired an indefeasible right against all the world. The decision of Mr. Justice *Chitty* in *Perry* v. *Eames* (1) is not binding on the Court of Appeal.

Warmington, in reply.

LINDLEY, L.J.:—

The question raised by this appeal is whether the Plaintiff is entitled to an easement of light over the land of the Defendants. The material facts are as follows: The Defendants' land is Crown property. In 1826 a lease of it was granted by the Crown for ninety-nine years from 1815. This lease, therefore, if not previously determined, would expire in 1914. In 1891 this lease became vested in the Defendants. On the 5th of September, 1892, they surrendered it to the Crown, and the Crown agreed to grant them a new lease of the same land on certain terms; and the Defendants agreed to erect a new building on the land. By this agreement the Defendants are to be responsible for, and are to make compensation for, all damage which may be done with respect to (*inter alia*) all rights of air and light which any person may have over the land. Under this agreement the Defendants are erecting the building of which the Plaintiff complains. The Plaintiff is the owner in fee of land adjoining the Defendants' land. The Plaintiff acquired his title in July, 1852, and he then built the house which he seeks to protect. He and his tenants have enjoyed access of light to that house for more than forty years without interruption. The light so enjoyed will be interfered with by the Defendants' new building. The Plaintiff issued his writ in this action in March, 1893—*i.e.*, more than forty years after the commencement of his enjoyment, but within three years after the termination of the Crown lease of 1826 by the surrender above mentioned. The Plaintiff's contention is (1.) that sect. 3 of the *Prescription Act* (2 & 3 Will. 4, c. 71) applies to the Crown; (2.) that, if not, it applies to the Crown's

(1) [1891] 1 Ch. 658, 666.

C. A.
1893
WHEATON
v
MAPLE & Co.
Lindley, L.J.

lessees, who have allowed access of light to be enjoyed over their property for twenty years without interruption; (3.) that, if the Plaintiff has not acquired a title by sect. 3, he has acquired such title by forty years' enjoyment under sect. 2 of the Act; (4.) that at all events a lost grant ought to be presumed in his favour, or immemorial enjoyment ought to be inferred. Mr. Justice *Kekewich* has held that the Plaintiff has not acquired an easement in fee against the Crown, but that he had acquired an easement against the lessees of the Crown for the residue of the term of ninety-nine years granted by the lease of 1826, and that the easement so acquired must be treated as subsisting as against the Defendants until the year 1914, when that lease would have expired by efflluxion of time if the Defendants had not surrendered it. From this judgment the Defendants have appealed.

Before considering the effect of the statute 2 & 3 Will. 4, c. 71, it is desirable to dispose of the points relied upon by the Plaintiff apart from that Act. A grant from the Crown, as distinguished from its tenant, cannot be presumed, for there has been no enjoyment against the Crown itself; and without it there is no foundation for such a presumption. A title by immemorial prescription is excluded by the known history of the Plaintiff's house, which was built in 1852 during the pendency of the Crown lease. The Crown lessee might, no doubt, have granted to the Plaintiff, his executors, administrators, and assigns, an easement over the land held under the Crown for the residue of the term created in 1826; such an easement, if so created, would bind the lessee, his executors, administrators, and assigns for the residue of the term thereby created; nor could the lessee, or any one claiming under him, defeat the easement so created by surrendering the term. The lessee could only surrender such interest as he had at the time of the surrender, and the surrenderee could only acquire the same interest: see *Doe* v. *Pyke* (1); *Piggott* v. *Stratton* (2). Moreover, in this respect the Crown would be in no better position than any other surrenderee. If, therefore, the Plaintiff had acquired by a grant from the Crown's lessee an easement for the residue of the term granted by the lease of 1826, the surrender of that lease would

(1) 5 M. & S. 146. (2) 1 D. F. & J. 33.

not have destroyed such easement; and, notwithstanding the surrender, the easement would have continued, even as against the Crown, until 1914, when the lease would have expired by effluxion of time. But in this case there is no evidence of any grant of any easement by any lessee of the Crown; nor can I infer as a fact such a grant by any of the Crown's lessees. But then it is contended that such a grant ought to be presumed as a matter of law. But this is not so. No such grant is required to account for the state of things which exists, nor is any fiction or presumption necessary to render legal, conduct of the Plaintiff which would have been illegal without it The Plaintiff has simply been enjoying his own property, as he was perfectly entitled to do; and no presumption of any grant entitling him to that enjoyment in the past, or to similar enjoyment in future, can properly be made. It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed: see *Cross* v. *Lewis* (1); *Moore* v. *Rawson* (2). But I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favour of such a grant. This view of the common law is in entire accordance with *Bright* v. *Walker* (3), where this doctrine of presumption is carefully examined.

The Plaintiff's right to the easement claimed is thus reduced to the statute 2 & 3 Will. 4, c. 71. The section specially applicable

(1) 2 B. & C. 686. (2) 3 B. & C. 332, 340.
(3) 1 C. M. & R. 211.

C. A.
1893
WHEATON
v.
MAPLE & Co.
Lindley, L J.

to light is sect. 3, which excludes all fictions and presumptions of law and is a clear and simple enactment. [His Lordship read the section.] Two questions arise upon this section in the present case, viz.: Does it bind the Crown? Does it confer a temporary right against a lessee of the Crown, although not as against the Crown itself as reversioner? In *Perry* v. *Eames* (1) it was decided that, although parts of the statute—viz., sects. 1 and 2—bind the Crown, yet sect. 3 does not; the reason being that the Crown is expressly mentioned in sects. 1 and 2, and is not mentioned in sect. 3. Upon reflection, I am of opinion that this decision is correct. Considering the difference between enjoying light in one's own property and enjoying other easements in other people's property, and considering the great alteration made by sect. 3 in the law applicable to light, I cannot regard sect. 3 as a mere addition or proviso to or qualification of sect. 2. It is what it purports to be—viz., a fresh and independent enactment relating to a different kind of easement. The Legislature may well have thought right to bind the Crown when persons had been for many years actively asserting rights over its property, and may yet have purposely omitted to impose upon the Crown the obligation of not interfering with persons who never, in fact, interfered with it. The Crown is never bound by a statutory enactment unless the intention of the Legislature to bind the Crown is clear and unmistakeable, and this is by no means the case in dealing with the question of lights.

I come now to the last question—viz., whether sect. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying sect. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading "absolute and indefeasible" as meaning absolute and indefeasible as against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An

(1) [1891] 1 Ch. 658.

easement for a term of years may, of course, be created by grant; but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression "absolute and indefeasible," as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement. This view of the statute was clearly expressed soon after it passed in *Bright* v. *Walker* (1), and although some passages in Baron *Parke's* judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act—viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious. It was contended that *Bright* v. *Walker* is inconsistent with *Frewen* v. *Philipps* (2); but this is a mistake attributable to the wording of the head-note in the latter case. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord. Similar observations apply to *Mitchell* v. *Cantrill* (3) and to *Robson* v. *Edwards* (4).

Although the expression "other easement" occurs in sect. 2, I concur in the view generally hitherto adopted, and judicially held to be correct, in *Perry* v. *Eames* (5), viz., that light is not included in sect. 2, but is governed entirely by sect. 3 and the

(1) 1 C. M. & R. 221.
(2) 11 C. B. (N.S.) 449.
(3) 37 Ch. D. 56.
(4) [1893] 2 Ch. 146.
(5) [1891] 1 Ch. 658.

C. A.
1893
WHEATON
v
MAPLE & Co.
Lindley, L.J.

subsequent sections which have to be read with it. I may, however, observe that if sect. 2 were applicable to this case, sect. 8 would be also applicable, and that, as the three years there mentioned had not expired before the writ was issued, the Plaintiff's right would not have been absolute and indefeasible even under sect. 2. It only remains to add that there are no circumstances in this case giving the Plaintiff any equitable, as distinguished from legal, rights against the Defendants. For the reasons I have given, I am of opinion that the Plaintiff has acquired no right to light under the statute or otherwise, and that the appeal must be allowed and judgment be entered for the Defendants, with costs here and below.

LOPES, L.J.:—

In March, 1893, this action was commenced by the Plaintiff against the Defendants for an injunction to restrain the Defendants from erecting any building so as to obstruct the ancient lights of the Plaintiff.

The Plaintiff is owner in fee of the land adjoining the Defendants', which he purchased in 1852, and then built the house for which he now claims a right to light, which light will be obstructed by the new building of the Defendants. The Defendants are lessees of Crown property. In 1826 a lease of it was granted from 1815 for ninety-nine years. The Defendants acquired their lease in 1891, and in 1892 they surrendered it to the Crown, and then took a new lease from the Crown on the terms (amongst others) that they would erect a new building, which they have done, and which new building is the building complained of. It was admitted that the Plaintiff had for more than forty years next before action brought actually enjoyed without interruption access and use of light to his house. Three years, however, had not expired next after the determination of the term of ninety-nine years by the surrender to the Crown in 1892 when this action was brought.

The Plaintiff contends that, independently of the *Prescription Act*, he can maintain his case on the ground that a lost grant ought to be presumed, and, if not, at any rate that enjoyment from time immemorial ought to be inferred. Both these con-

tentions can be easily disposed of. For convenience sake the fiction of a lost grant is very often pressed into the service; but to presume a lost grant made by the Crown, or the lessees of the Crown, since 1852 and lost, would be overtaxing the credulity of the most credulous, and would be making a demand too extravagant even for the elasticity of this patient and accommodating fiction. As for enjoyment from time immemorial, how can that be presumed when it is an admitted fact that the house now claiming the right only came into existence in 1852? The head of the prescription is cut off, and this contention of the Plaintiff fails.

I will now deal with the *Prescription Act* (2 & 3 Will. 4, c. 71). The Plaintiff says he has acquired an absolute and indefeasible right by his enjoyment as of right without interruption for forty years of the access of light to his house. Under the 2nd section of the Act it is to be observed that the Crown is mentioned in this section, and would be bound. If the Plaintiff can bring his case within this section he will succeed. But there are two answers to his contention. First, that sect. 2 does not apply to an easement of light, and, secondly, if it did, the Plaintiff would be met by the 8th section of the *Prescription Act*, which gives the reversioner three years next after the end of the term within which to resist the claim. Three years had not expired after the determination of the lease by surrender previously to the issue of the writ. Is the easement of light within sect. 2? It is true the expression "other easement" occurs in sect. 2. But it was held by Mr. Justice *Chitty* in *Perry* v. *Eames* (1), in his lucid judgment delivered in that case, that the words "other easement" did not apply to an easement of light, which is governed exclusively by sect. 3 and subsequent ancillary sections. I entirely concur with that judgment and with the reasons given for holding the easement of light not within the terms of sect. 2, but exclusively regulated by sect. 3 and subsequent sections. This disposes of the Plaintiff's case so far as sect. 2 is concerned.

The Plaintiff further contends that he has obtained an absolute and indefeasible right by forty years' actual enjoyment without interruption under sect. 3. If the Crown was named in this

(1) [1891] 1 Ch. 658.

C. A
1893
WHEATON
v
MAPLE & Co
Lopes, L J.

section it would be bound and the Plaintiff's case would be established; but the Crown is not named and is not bound. Absolute and indefeasible means absolute and indefeasible against the whole world. Unless the enjoyment gives a title against all persons having any interest in the *locus in quo*, it gives no title at all: *Bright* v. *Walker* (1). *Frewen* v. *Philipps* (2) in no way conflicts with *Bright* v. *Walker*, for the title there acquired was absolute and indefeasible, being good against the reversioner and every person having any interest in the *locus in quo*. In the present case, however, the Crown, not being named in sect. 3, is not bound, and no absolute and indefeasible title is acquired, good as it must be against every person interested: *Perry* v. *Eames* (3).

But the Plaintiff says, if the Crown is not bound, at any rate the lessees of the Crown are bound, against whom the Plaintiff has enjoyed access of light to his house for more than forty years. Undoubtedly this would be so if, as in *Frewen* v. *Philipps*, there was a reversioner who could be bound. But the easement suggested is a qualified or terminable easement. Such an easement could not have been claimed by immemorial prescription, and was not contemplated by the *Prescription Act*. It must be such an easement as absolutely binds the fee in the land. The statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons, invalid as to others.

I cannot, therefore, agree with Mr. Justice *Kekewich*, who has held that though the Plaintiff has not acquired a title against the Crown, he has acquired a title against the lessees of the Crown for the residue of the term created by the lease of 1826, which easement would have existed until the expiration of the term by effluxion of time if there had been no surrender. Such an easement might have been created by a grant from the lessee of the Crown to the Plaintiff. Such a grant would have bound the Defendants and their successors in title for the residue of the term. If such a grant had been made before surrender, it would not have been defeated by surrender, but would have

(1) 1 C. M. & R. 211. (2) 11 C. B. (N.S.) 449.
(3) [1891] 1 Ch. 658.

stood good even against the Crown until 1914. The surrenderee, whether the Crown or a subject, would have taken subject to existing rights. It is not and cannot be pretended that any such grant was in fact ever made. I am of opinion that no title at all is conferred on the Plaintiff.

The appeal must be allowed, and judgment entered for the Defendants with costs here and below.

A. L. SMITH, L.J.:—

The main question in this case is whether the Plaintiff, who has actually enjoyed the access and use of light to his dwelling-house for the full period of twenty years without interruption before action brought over lands contiguous to his house—in this case in reality for forty years, for his house was built in 1852—is entitled to restrain certain lessees of the Crown from building upon such lands so as to obstruct his lights. The Plaintiff established this enjoyment. The Defendants proved that in the year 1891 they became assignees of the residue of the term of a ninety-nine year lease of lands granted by the Crown from 1815, which lease expires in 1914, and for the present purpose I will treat the case as if the Defendants were still such assignees.

It was proved that the Defendants proposed to build upon the lands of which they are such lessees so as to obstruct the Plaintiff's lights. Mr. Justice *Kekewich* held upon the facts that the Plaintiff could not maintain any action founded either upon prescription at common law or upon an assumed lost grant, in both of which findings I agree, for, as was said by Lord Justice *Bramwell* in the *Duke of Norfolk* v. *Arbuthnot* (1), as regards the prescription at common law we know the whole truth, and prescription at common law is consequently not maintainable; and I also decline, as Mr. Justice *Kekewich* has done, in the circumstances of this case to presume a lost grant either from the Crown or its lessee, for there are no facts from which I should infer a covenant not to obstruct the Plaintiff's lights to have been granted by any one. Lord Justice *Lindley* has so fully dealt with this point, that I have nothing to add thereto. As the Plaintiff can therefore only maintain his cause of action

(1) 5 C. P. D. 390, 392.

C. A.
1893
WHEATON
v.
MAPLE & Co
A. L. Smith, L. J.

under sect. 3 of *Lord Tenterden's Act* of 1832 (2 & 3 Will. 4, c. 71), it becomes necessary to ascertain what is the true construction of that section. It reads as follows. [His Lordship read the section, and continued:—]

This and the two preceding sections have been the subject of many decisions, and it appears to me to have been settled, first, that the words "or other easement" in sect. 2 do not include the claim to the use of light specially provided for by sect. 3. The suggestion that Lord *Selborne* thought otherwise in *Dalton* v. *Angus* (1) is ill founded. What he there stated was this: "The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by shewing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water rights, and lights, which (by the 3rd section) are specially provided for, and exceptionally favoured?" This is by no means a statement that sect. 2 embraced lights, but, on the contrary, that such are specially provided for and exceptionally favoured by sect. 3. *Coleridge*, J., in *Truscott* v. *Merchant Taylors Company* (2), has stated that sect. 3 seemed to him almost to new-found the mode of acquiring the right to access to light, and Lord *Westbury*, in *Tapling* v. *Jones* (3), said: "The right to what is called an ancient light now depends upon positive enactment," *i.e.*, sect. 3. Moreover, it has for many years been thought in the profession that sect. 3 was the section, and the only one, which dealt with lights. The point now argued, that sect. 3 is to be read as a proviso upon sect. 2, is, in my judgment, wholly untenable, as Mr. Justice *Chitty* has held to be the case in *Perry* v. *Eames* (4), in which I agree. It has been held, to use the words of Baron *Parke*, that sect. 3 "converts into a right such an enjoyment only of the access of light over contiguous land, as has been had for the whole period of twenty years, in the character of an easement distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing in this respect as those positive easements provided for by the other sections, all of which, after long enjoyment as

(1) 6 App. Cas. 798.
(2) 11 Ex. 855, 863.
(3) 11 H. L. C. 290, 304.
(4) [1891] 1 Ch. 665, 666.

easements, are invested with the quality of rights": *Harbidge* v. *Warwick* (1). In my judgment, it is too late now to argue all of the above-mentioned propositions, and, what is more, I think that they have been rightly decided.

The question which arises, therefore, is, Has the Plaintiff for the whole period of twenty years enjoyed, in the character of an easement, the access of light without interruption over land contiguous to his dwelling-house so as to have acquired a right within sect. 3? If this contiguous land had belonged to a subject, the answer would have been Yes; but the contiguous land is the land of the Crown, and not the land of a subject; and that raises what, to my mind, is the real point in this case—viz., does sect. 3 apply at all to a case where the land over which the enjoyment has taken place is the land of the Crown, even though it has been for years in the occupation of a subject who is lessee of the Crown? As I have before said, sect. 3 of this Act has to stand alone; it is not to be read, as suggested by Mr. *Marten* for the Plaintiff, as a proviso upon sect. 2, in which section the Crown is named; and, applying the well-known rule, the Crown not being named in sect. 3, neither it nor its lands are bound thereby. Mr. Justice *Chitty*, in the case of *Perry* v. *Eames* (2), above mentioned, had to decide whether the Crown was bound by sect. 3. I have fully considered his judgment. He came to the conclusion that the Crown was not bound, and with his reasons and conclusions I entirely agree.

If, then, the enjoyment of the access and use of light over land contiguous to the Plaintiff's dwelling-house for a period of twenty years is only converted into a right which the Plaintiff can enforce by reason of the provisions of sect. 3, and that section does not apply to an enjoyment in the nature of an easement over lands of the Crown, how can it be said that the section gives any right to the Plaintiff? for it is only over Crown lands that he is now seeking to enforce such rights.

It is argued that, though this may be so as regards the Crown if the lease had run out and the Crown was obstructing the Plaintiff's lights, yet the section applies to and binds the lessees of the Crown so long as the lease remains, because they and their

(1) 3 Ex. 552, 556. (2) [1891] 1 Ch. 665.

C. A.
1893
WHEATON
v.
MAPLE & Co
A. L. Smith, L.J.

predecessors as lessees have permitted the uninterrupted enjoyment of the access and use of the light to the Plaintiff's dwelling-house, and they are the persons who are now raising the obstruction to the lights. This position Mr. Justice *Kekewich* has held to be well-founded, and decided that the Defendants, the lessees, were bound by the section so long as the lease existed. I own that at first sight this appears plausible; but, when examined, it seems to me to be unsound, and to be concluded by authority. I have pointed out that, to constitute the right claimed by the Plaintiff under the section, the access and use of the light must have been enjoyed in the character of an easement. The case of *Bright* v. *Walker* (1), over fifty years ago, decided that the section nowhere contains any intimation that there might be different classes of rights, qualified and absolute, valid as to some persons and invalid as to others, and held that, when the enjoyment is of the character of an easement, and it cannot give a valid title against all persons having estates in the *locus in quo*, the statute gives no right at all, even against a lessee, during the continuance of the term. Baron *Parke*, in delivering the judgment of the Court, distinctly lays this down. He says (2): "The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all?" and he answers this question by saying: "No title at all is gained by an user which does not give a valid title against all, and permanently affect the See," which, in this case, would be the Crown. In other words, a person cannot obtain an absolute and indefeasible right within the meaning of the statute unless by the user he can get a right against all. If he does not, he gets no absolute and indefeasible rights within the section.

The present case falls directly within this decision, which, as regards this point of the statute, has never been impugned. The case of *Frewen* v. *Philipps* (3), and the two Irish cases cited by Mr. *Marten*, in no way affect the construction of the statute as regards this point; and, inasmuch as the Plaintiff cannot make

(1) 1 C. M. & R. 211. (2) 1 C. M. & R. 220.
(3) 11 C. B. (N.S.) 449.

out a title against all, he cannot make out a title against any, and consequently he cannot avail himself of the section; and in my judgment this action fails against the Defendants, who are lessees of the Crown. This appeal must be allowed.

Solicitors: *Wakeford May & Woulfe; Peake, Bird, Collins, & Peake.*

M. W.

STIRLING, J.
1893
April 13

In re SUDBURY AND POYNTON ESTATES. VERNON *v.* VERNON.

[1893 S. 175.]

Settled Estates—Improvements—Tenant for Life—Provision in Settlement for repayment by Tenant for Life of Money raised for Improvements—Inconsistency with Powers of Settled Land Act, 1882—*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), s. 51.

By a settlement of family estates, made in 1877, the trustees were empowered by the direction of the tenant for life, to raise money by mortgage of the settled lands, to be applied by him for the purpose of improvements thereon similar in the main to those authorized by the *Settled Land Act*, 1882; and the annual rents of the settled lands were charged with the payment to the trustees, for twenty-five years from the raising of the money, of an annual sum equal to one-twenty-fifth of the money paid to the tenant for life, who was to be bound to pay such annual sum, and to keep down the interest on the charge.

Under the powers of the settlement money had been raised for improvements by direction of the tenant for life, and he had made certain annual payments towards the sinking fund created by the settlement:—

Held, (1.) that the money standing to the credit of the sinking fund was capital money under sect. 33 of the *Settled Land Act*, 1882, and applicable as such.

(2.) That the provision obliging the tenant for life to recoup the money expended on improvements was not void as inconsistent with the exercise of the powers of the *Settled Land Act*, 1882, within the meaning of sect. 51 thereof; and

(3.) That the tenant for life was not precluded from resorting to the powers of the *Settled Land Act*, 1882; but having already resorted to the powers of the settlement, was meanwhile bound to continue his payments to the sinking fund thereby created.

THE estates of the *Vernon* family were resettled in strict settlement by an indenture dated the 14th of April, 1877, whereby (*inter alia*) the trustees were authorized, by the direction of Lord *Vernon*, the tenant for life, to raise money by mortgage of the settled lands, to be paid to the tenant for life, and to be by him applied for improvements on the estate, of mainly a character similar to, though somewhat more extensive than those authorized by sect. 25 of the *Settled Land Act*, 1882, and without liability on the part of the trustees to see to the

application thereof or for any misapplication or non-application thereof. And it was declared by the settlement that so often as any money should be paid as aforesaid to a tenant for life, the annual rents and profits of the settled estate should stand charged with the payment to the trustees of such an annual sum as should be equal to one-twenty-fifth of the money which should on each occasion have been so paid to such tenant for life, such annual sum to commence from the time of payment to the tenant for life, and to continue for the term of twenty-five years, and to be paid half yearly; and every tenant for life was to be bound to pay such annual sum half yearly to the trustees, as well as to keep down the interest on any charge or mortgage which the trustees had effected for the purpose of the improvements.

In default of payment by the tenant for life the trustees were to raise the said annual sum and the arrears thereof by means of a term of 500 years; and they were to invest the half-yearly instalments when received from the tenant for life upon securities authorized as investments for moneys arising from the sale of the settled lands under the general power of sale contained in the settlement, and to stand possessed of the instalments, and the investments representing the same, and the annual income thereof upon the trusts declared concerning such sale moneys, which according to the settlement might be applied in the purchase of other lands to be settled in the same way, or in discharge of any incumbrance on the settled lands.

Under this power money had by the direction of the tenant for life been raised by the trustees, and had been paid to, and applied by the tenant for life in improvements. The tenant for life had paid the instalments due up to the present time; but the whole of the money raised had not yet been replaced, and the question was raised whether the tenant for life was bound to make any further payments towards the sinking fund created by the settlement.

This was an originating summons taken out by the trustees under sect. 56 of the *Settled Land Act*, 1882, to have it determined (1.) whether the moneys and investments standing to the credit of the sinking fund thus constituted, were capital moneys or investments of capital moneys under and within the meaning

STIRLING, J.
1893
In re SUDBURY AND POYNTON ESTATES.
VERNON v. VERNON.

of the *Settled Land Acts*, (2.) whether the trustees had power to apply the fund standing to the credit of the sinking fund in payment for improvements, and (3.) whether the tenant for life was bound to make any further payments towards this sinking fund.

Henry L. Lopes, for the Trustees:—

The special provisions in the settlement, imposing upon the tenant for life (if he resorts to them) the obligation to replace by instalments the money raised, are in no way repugnant to or inconsistent with the scope of the *Settled Land Act*, 1882. They are somewhat wider, but no provision in the Act is defeated by them, and having resorted to them the tenant for life is bound to continue the payments required by them.

Hastings, Q.C., and *Maidlow*, for Lord *Vernon*:—

The effect of imposing upon the tenant for life these conditions for the creation of a sinking fund is to prevent him from making improvements at the expense of the estate and to throw such expenses upon his income. A provision of this character is contrary to the policy and intention of the *Settled Land Act*, 1882, and inconsistent with the exercise of the powers thereunder within the meaning of sect. 51 thereof, and it is consequently void. Lord *Vernon* is therefore no longer under the obligation of keeping up the sinking funds. [They referred to *In re Ormrod's Settled Estate* (1).]

STIRLING, J.:—

As to the first question raised by the summons, I do not feel any great difficulty. The sums of money received under the provisions of the settlement are, in my opinion, capital moneys within sect. 33 of the *Settled Land Act*, 1882.

What has happened is this. The power of raising money has been exercised to a certain extent, and the sums of money raised have been dealt with, not in accordance with the provisions of the *Settled Land Act*, but in accordance with those of the settlement. The scheme of the settlement is that the

(1) [1892] 2 Ch. 318.

funds when raised are to be handed to the tenant for life at his request, to be applied for improvement purposes, the trustees not being bound to see to the application of them. The improvement purposes sanctioned by the settlement are to a large extent similar to those sanctioned by the *Settled Land Act*, 1882; in some respects they go beyond them; but in the main they are those provided for by the Act. The trustees have handed the funds to the tenant for life, and he has applied them in improvements accordingly. Under the terms of the settlement he is bound to replace the sums spent, by paying to the trustees annual instalments of one twenty-fifth of each sum handed over to him, and the question is whether Lord *Vernon* is under an obligation to continue to make payment of the instalments. It seems to me that he is. The moneys when received by the trustees are, as I have said, capital moneys under the Act. It was competent for the tenant for life to apply to the trustees to have the funds dealt with under the Act, and applied in payment for the improvements accordingly; but as regards capital moneys so to be applied, section 26 of the Act of 1882 provides that the tenant for life is to submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvements, shewing the proposed expenditure thereon.

In the present case the Act was not resorted to, but the money was handed over to the tenant for life to deal with himself. Why, then, should he be released from the obligation imposed on him by the settlement to make the annual payments of the one twenty-fifth? It is said that that provision is contrary to the policy of the Act, and is void under sect. 51. But does this obligation to recoup the money expended, in case the powers of the settlement are resorted to, tend to prevent the tenant for life from exercising any of the powers of the Act? I cannot see that it does. The obligation only arises when the money is handed over to the tenant for life, to be dealt with according to the provisions of the settlement. It was open to him, and it still is open to him, to have the money applied under the Act. If he had asked the trustees to deal with it under the Act, he would not have been under any obligation to recoup it.

STIRLING, J.

1893

In re SUDBURY AND POYNTON ESTATES

VERNON *v.* VERNON.

If the provision in the settlement had been that he was bound to recoup the money if it had been applied by the trustees under the Act, that would have been void; but that is not the case. It seems to me that, so far from the provision in question tending to prevent the tenant for life from exercising the powers of the Act, it affords a strong inducement to him to exercise the powers of the Act, and not the powers of the settlement. Unfortunately, he has resorted to the powers of the settlement, and all I say is that, having done so, he is bound to continue to pay the annual sums provided by the settlement. But that does not preclude him from resorting to the powers of the Act, and my judgment is without prejudice to any application which he may make under sect. 15 of the *Settled Land Act*, 1890. Upon the present summons I only say that there is an obligation upon Lord *Vernon* to continue making payments to the sinking funds in question according to the provisions of the settlement.

Solicitors for parties: *Arnold & Henry White.*

W. W. K.

MILBANK *v.* VANE.

[1892 M. 1056.]

C. A.
1893
KEKEWICH, J.
Jan. 17, 18.
C. A.
March 22.

Estate Tail—Will—Limitations of Real Estate—Postponement Clause—Disentailing Deed—Estates "in Defeasance of" Estate Tail—Fines and Recoveries Act (3 *&* 4 *Will.* 4, *c.* 74), *s.* 15.

Sect. 15 of 3 & 4 Will. 4, c. 74, enables every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, to dispose of for an estate in fee simple the entailed lands as against (amongst others) all persons whose estates are to take effect "in defeasance of" the estate tail vested in the person making the disposition, "saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made."

Lands were devised in trust for *A.* for life, remainder to his first and other sons successively in tail male, with similar remainders over to *B.* and *C.*, younger brothers of *A.*, and their respective first and other sons successively in tail male, and the will contained a proviso that upon the happening of a specified event the trusts in favour of *B.* and his issue male "should thenceforth be postponed to, and take effect in remainder next immediately after" the trusts in favour of *C.* and his issue male. *A.* being tenant for life in possession under the will, *B.* and his eldest son, with *A.'s* consent, executed a disentailing deed conveying the lands in fee simple. Subsequently, during the continuance of *A.'s* life estate, the event specified in the proviso happened, and upon *A.'s* death *C.'s* eldest son became, unless barred by the disentailing deed, entitled to the lands, under the proviso, as tenant in tail in possession:—

Held, that the true effect of the proviso was to make, on the happening of the specified event, the estate limited to *C.* and his issue male an estate "in defeasance of," and not "prior to," the estate tail of *B.* and his issue male, and therefore that the estate of *C.'s* eldest son was barred, under the statute, by the disentailing deed.

APPEAL from the judgment of Mr. Justice *Kekewich*, upon a point of law arising upon the pleadings in an action.

The action was brought to obtain a declaration that the Plaintiff became, on the 21st of August, 1891, equitable tenant in tail in possession, and as such entitled to the possession and the rents and profits of certain lands and hereditaments devised by the will of the first Duke of *Cleveland*.

The material facts appearing from the pleadings were as follows:—

By a settlement dated the 31st of May, 1817, and made on

C. A.
1893
MILBANK
v.
VANE.

the marriage of *Mark Milbank* with Lady *Augusta Henrietta Vane* (daughter of the first Duke of *Cleveland*), certain lands and hereditaments in the county of *York* were conveyed to trustees upon certain trusts and subject thereto (in events which subsequently happened) to the use of the first and other sons of the marriage successively in tail male.

By the will of the first Duke of *Cleveland*, dated the 15th of June, 1836, the testator devised his *Raby* estates in the counties of *Durham*, *Middlesex*, *Salop*, *Stafford*, and *Northampton*, to trustees upon trust (so far as is material) for his second son (afterwards third Duke of *Cleveland*) for life with remainder to the first and other sons of the third Duke in tail male, with remainder in trust for the testator's third son (afterwards fourth Duke of *Cleveland*), and his first and other sons successively in tail male, with remainder in trust for the testator's eldest son (afterwards second Duke of *Cleveland*), and his first and other sons successively in tail male, with remainder in trust for *Frederick Acclom Milbank* (the second son of the testator's daughter Lady *Augusta Henrietta Milbank* by her marriage with *Mark Milbank*) for life, with remainder in trust for the first and every other son of the said *Frederick Acclom Milbank* in tail male, with remainder in trust for *Henry John Milbank* (the third son of Lady *Augusta Henrietta* and *Mark Milbank* for life), and his first and other sons successively in tail male, with remainder to *Mark William Vane Milbank* (the eldest son of Lady *Augusta Henrietta* and *Mark Milbank*), and his first and other sons successively in tail male, with remainders over.

Then came a proviso as follows: "Provided always and I do hereby declare that if by reason of the death and failure of issue male of the said *Mark William Vane Milbank*, or of the eldest son for the time being of the said Lady *Augusta Henrietta Milbank* by the said *Mark Milbank* any younger son, or the issue male of any younger son of the said Lady *Augusta Henrietta Milbank* by the said *Mark Milbank*, shall become entitled for an estate tail in possession to any real estates now settled upon the first and other sons of the said *Mark Milbank* successively in tail male, or would if any real estates had been and then continued to be so settled have been so entitled thereto, and if in such case

any other son or sons or issue male of any other son or sons of the said Lady *Augusta Henrietta Milbank* by the said *Mark Milbank* shall be then in existence, then, and so often as the same shall happen, the trusts hereinbefore contained concerning my said hereditaments in favour of the younger son, and the issue male of the younger son who or whose issue male shall have or would have become entitled as aforesaid, shall thenceforth be postponed to and take effect in remainder next immediately after the trusts hereinbefore contained in favour of the other son and sons, and the issue male of the other son and sons of the said Lady *Augusta Henrietta Milbank* by the said *Mark Milbank*, her husband."

The first Duke of *Cleveland* died in 1842. The second Duke died on the 18th of June, 1864, without issue; and the third on the 6th of September, 1864, without issue. Lady *Augusta Henrietta Milbank* died on the 13th of September, 1874, and her husband, *Mark Milbank*, in 1881, leaving issue of the marriage; (1.) *Mark William Vane Milbank*, born in 1819, who died in October, 1883, without male issue; (2.) *Frederick Acclom Milbank*, born in 1820; (3.) *Henry John Milbank*, born in 1824, who died on the 4th of June, 1872, leaving issue *Godolphin Henry Vane Milbank*, him surviving; and (4.) *Augustus Sussex Milbank*, born 1827, who died in 1887.

In 1872, the fourth Duke of *Cleveland* was tenant for life of the estate devised by the will of the first Duke.

The fourth Duke had no issue, and the next remainder under the will was in trust for *Frederick Acclom Milbank* for life with remainder in trust for his eldest son *William Henry Vane Milbank* in tail male.

On the 17th of June, 1872, *William Henry Vane Milbank* and *Frederick Acclom Milbank*, with the consent of the fourth Duke of *Cleveland*, executed a disentailing deed in respect of the *Raby* estates devised by the will of the first Duke of *Cleveland*, and by an indenture of even date the same estates were conveyed in fee to the fourth Duke.

Upon the death of *Mark William Vane Milbank* without male issue in 1883, *Frederick Acclom Milbank* became entitled, as tenant in tail in possession, to the real estates in the county of

C. A
1893
MILBANK
v.
VANE

York, conveyed by the marriage settlement of the 31st of May, 1817, so that the event mentioned in the proviso in the first Duke of *Cleveland's* will happened.

The fourth Duke of *Cleveland* died without leaving male issue, in August, 1891, having by his will devised the *Raby* estates to trustees upon certain trusts therein mentioned. Under these trusts the Defendant Lord *Barnard* (sued as *Henry De Vere Vane*), claimed to be tenant for life of the *Raby* estates.

This action was brought by *Godolphin Henry Vane Milbank* against Lord *Barnard* as claiming to be tenant for life of the *Raby* estates; also against him and the Rev. *G. H. F. Vane*, the trustees and executors under the will of the first Duke; Lord *Wolmer* and *F. G. H. Price*, trustees under the will of the fourth Duke; and Captain *F. W. Forester*, who under the will of the fourth Duke took a life estate in certain lands in the counties of *Kent*, *Sussex*, and *Somerset* thereby devised.

The point of law raised upon the pleadings by the Defendants was that the proviso in the will of the first Duke of *Cleveland* became inoperative or was defeated, and that any estate or interest which the Plaintiff might otherwise have taken under the will was barred or defeated by the disentailing assurance of the 17th of June, 1872.

The point of law came on for hearing before Mr. Justice *Kekewich* on the 17th of January, 1893.

Cozens-Hardy, Q.C., *Danckwerts*, and *Swinfen Eady*, for the Plaintiff, contended that upon the death of *Mark William Vane Milbank* in 1883, without issue, the proviso in the will of the first Duke came into effect, so that *Henry John Milbank* (the third son of Lady *Augusta Milbank* by *Mark Milbank*) and his issue became entitled to the *Raby* estates expectant on the death of the fourth Duke and failure of his issue; and accordingly that upon the death of the fourth Duke without issue, the Plaintiff became equitable tenant in tail in possession, the disentailing deed of 1872 not having the effect, under sect. 15 of the *Fines and Recoveries Act*, 3 & 4 Will. 4, c. 74 (1), of destroying the Plaintiff's estate tail.

(1) Sect. 15 of 3 & 4 Will. 4, c. 74, enacts: "That after the 31st day of December, 1833, every actual tenant in tail, whether in possession, re-

Doe v. *Earl of Scarborough* (1) will probably be relied on by the Defendants; but in that case there was a proviso for cesser, causing an absolute determination of all the estates, whereas in the present case there was not a word about cesser or determination. *Roper* v. *Hallifax* (2), referred to in that case, is in our favour.

[They also referred to *Sackville-West* v. *Viscount Holmesdale* (3), and *Cope* v. *Earl De La Warr* (4).]

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the Defendant, Lord *Barnard*, contended that this case was covered by the principle in *Doe* v. *Earl of Scarborough*; that the proviso became inoperative, and that the Plaintiff's interest had been barred by the disentailing deed of 1872.

Warmington, Q.C., and *W. C. Druce*, for the Defendant, Captain *F. W. Forester*.

Renshaw, Q.C., and *E. Beaumont*, for the Defendants, the trustees of the will of the fourth Duke.

Kenyon Parker, for the Defendants, the trustees of the will of the first Duke.

Cozens-Hardy, in reply.

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mainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made."

(1) 3 A. & E. 2, 897.
(2) 8 Taunt. 845.
(3) Law Rep. 4 H. L. 543.
(4) Ibid. 8 Ch. 982.

C. A.
1893
MILBANK v. VANE.

KEKEWICH, J.:—

It is not my intention to examine either the arguments or the judgments in the case of *Doe* v. *Earl of Scarborough* (1). Those judgments, and indirectly the arguments, have necessarily formed the staple of the arguments of counsel before me; but all I have to do, as regards those judgments, is to endeavour to read and consider, not merely what was said in reference to the particular instrument before the Court, but the principle on which the considered judgment of the Court was founded, and then to apply it, if applicable, to the case now before this Court.

The principle of *Doe* v. *Earl of Scarborough*, so far as it is necessary to consider it for the present purpose, is, to my mind, simple enough. I understand the principle of it to be that when once you find that a disentailing assurance, whether by recovery before the statute (3 & 4 Will. 4, c. 74), or by deed after the statute, is complete in form—that is, is an assurance made in proper form by persons filling the proper positions of protector of the settlement, to use the modern language — and tenant in tail in remainder, then all you have to inquire is whether an estate said not to be barred is an estate not exactly falling within the language of the Act of Parliament. If it is an estate (adopting the language of the 15th section) "to take effect after the determination or in defeasance of any such estate tail," then it is absolutely gone. The case of *Doe* v. *Earl of Scarborough* really only exemplifies that and expounds it, though, of course, with reference to the particular circumstances before the Court. Therefore, I have to look at the instrument before me and consider whether there is an estate here defeating, or purporting to defeat, the estate tail which was barred by the disentailing assurance of 1872. If it is of that character then it is immaterial to inquire further: that estate is gone. If, on the other hand, it does not fall within that character—if it is an estate of a different character, then I have to see whether it has not properly come into existence—whether it is still now subsisting.

It would be wrong to say that everything turns upon the

(1) 3 A. & E. 2, 897.

proviso, because one, of course, has to read the rest of the will first, in order to test the proviso; and the proviso cannot be understood without reference to the provisions of the will which precede it.

But the part of the will on which the question mainly turns is the proviso. Let me paraphrase it, or put it in another form perhaps more proper than the language of the will. The testator has, so to speak, written his will in paragraphs; that is to say, he has given an estate for life to one member of the family whom he intended to be the object of his bounty, with remainders to the sons of that tenant for life in the usual form, and then by another paragraph, or—to use an expression derived from cases on an entirely different branch of law—by another *fasciculus* of clauses, he has limited the estates to another member of the same family, with remainder to his sons in tail. In each of those cases the estate for life and the estate in tail in remainder is a vested estate. There is no pretence for saying that either of those estates is limited conditionally or contingently. There is nothing approaching a conditional limitation or a contingent remainder. Each *fasciculus* of limitations contains a number of estates vested. Then, when we come to the proviso, it seems to me that all it does is to say that, in a certain event, you shall take one paragraph or one *fasciculus* of limitations and write it into the will immediately before the paragraph or *fasciculus* of limitations which, as the will now stands, precedes it. The language of the proviso says that the prior limitations are to be postponed to those which follow; that the posterior limitations are to be accelerated—that is to say, put before those which now precede them. What is that but defeating the prior limitations? Where is there in that any creation of new estates? The life estate limited to the first taker, and the estate tail limited to his son, still remain in the will, but their places are altered; that is to say, that their positions in enjoyment, the possibilities of their coming into possession, are materially altered in point of time. But what difference is there in either the quantity or the quality of the estate? It seems to me that they are precisely the same estates, only limited in a different order. To that extent, therefore, the first estate for

C. A.
1893
MILBANK
v.
VANE.
Kekewich, J

life is defeated; to that extent the estate in tail of the first son of the first tenant for life is defeated, and it has not been suggested, and could not be suggested, that the Act means a total defeasance. A partial defeasance is as good for the purpose of the application of the Act as a total defeasance. The takers of the estates are in some way put out of joint, they are in some way disturbed in their enjoyment by the operation of the proviso.

If that be the right view, it seems to me to follow as a matter of course that a protector of the settlement necessarily must have an estate with a vested tenancy in tail; he executes the disentailing assurance which would bar these other subsequent estates which are to be substituted for them in a certain event and are thereby defeated.

Mr. *Hardy's* argument is based upon the hypothesis that there is an alternative series of limitations. I am far from saying that it is impossible to frame an alternative series of limitations, so that the tenant for life and the tenant in tail under one can bar the tenant for life and the tenant in tail under the other series before the event has happened which is to determine who is to enjoy the estate in possession. But it does not seem to me that a clause such as this can have legal effect given to it by calling it the creation of an alternative series of limitations, when in substance it is what I have endeavoured to describe. It is a misnomer, to my mind, to call it an alternative series of limitations. It is merely the shifting the substitution—it matters not what word you use—of one series of limitations for another in such a way as to "postpone" (the very word that is used) those to whom the estate is first limited; that is to say, to defeat their enjoyment in favour of the second. It seems to me that, whatever you may call it, it is, in substance, a defeasance; and, being such, it is strictly and directly within the words of the statute. Accordingly, I hold that the disentailing assurance was effective, and that the Plaintiff cannot sustain his claim.

Sir *H. Davey*, Q.C.:—

As your Lordship's decision of the point of law "substantially

disposes of the whole action," I ask, under *Rules of Supreme Court*, 1883, Order XXV., rule 3, that the action may be dismissed.

Cozens-Hardy, Q.C.:—

I ask your Lordship not to dismiss the action, but, under the rule, "make such other order thereon as may be just." Your Lordship has to deal now only with the particular point of law that has been argued; there are other points behind, such as a question of perpetuities, which will have to be argued in the action. If the Plaintiff should desire to go to the Court of Appeal, the convenient course would be to do so on this one point of law.

KEKEWICH, J.:—

I simply decide the point of law against the Plaintiff, and direct him to pay the costs of this hearing in any event. There I leave the matter for the present. If the Plaintiff fails on the point of law elsewhere, a motion for judgment will be a matter of course.

G. I. F. C.

C. A.

The Plaintiff appealed from his Lordship's decision on the point of law. The appeal was heard on the 22nd of March, 1893.

Cozens-Hardy, Q.C., and *Danckwerts*, for the Appellant, referred to *In re Dugdale* (1), and *Newis* v. *Lark* (2), in addition to the authorities cited in the Court below.

Sir *H. Davey*, Q.C. (*Levett*, Q.C., and *Ingle Joyce*, with him), for the Respondent, Lord *Barnard*, argued as in the Court below.

Warmington, Q.C., and *W. C. Druce*, for the Respondent, Captain *F. W. Forester*.

Renshaw, Q.C., and *E. Beaumont*, for the Respondents, the trustees of the will of the fourth Duke of *Cleveland*.

Kenyon Parker, for the Respondents, the trustees of the will of the first Duke of *Cleveland*.

Cozens-Hardy, in reply.

(1) 38 Ch. D. 176. (2) Plowd. 403, 408.

C. A.
1893
MILBANK v. VANE.

LINDLEY, L.J.:—

I have not been able to entertain any doubt about this case since I understood it. In 1872 the position of affairs was this: a disentailing deed was executed shortly before the conveyance in fee to the fourth Duke. The fourth Duke, under the will, was tenant for life, with remainder to his first and other sons in tail male, with remainders over. In 1872, *F. A. Milbank*, and his eldest son the tenant in tail, executed a disentailing deed in which the tenant for life in possession joined in his character of protector of the settlement. What we have to consider is the effect of that deed, and its effect depends on the true construction of sect. 15 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74). I do not think that sect. 15 has in any way altered the law as it stood before. I do not think there is any difference between the operation of that section and the operation of fines and recoveries, as they were well known, and as they were worked out in the case of *Doe* v. *Earl of Scarborough* (1). Sect. 15 says: "Every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made." Now we have to consider what there was when this disentailing deed was executed which could be barred or could not be barred. On the one hand, every estate or limitation which was to take effect after the determination or defeasance of the estate tail was to be barred. On the other hand, estates prior to the estate tail were

(1) 3 A. & E. 2, 897.

not to be barred. Here we have a proviso in the first Duke's will which states what is to occur in a certain event, which happened in 1883 after the disentailing deed of 1872 was executed. I need not read that part of the proviso which defines the happening of the event; but, after stating the event, the proviso goes on to say what is to be the consequence of its happening: "Then and so often as the same shall happen the trusts hereinbefore contained concerning the said hereditaments in favour of the younger son and the issue male of the younger son who or whose issue male shall have or would have become entitled as aforesaid shall thenceforth be postponed to and take effect in remainder next immediately after the trusts hereinbefore contained in favour of the other son or sons and the issue male of the other son and sons of the said Lady *Augusta Henrietta Milbank* by the said *Mark Milbank* her husband." The language of the proviso seems to me tolerably plain and unambiguous, though it is somewhat involved and requires attention to follow its meaning. In the first place, I will consider the point made by Mr. *Cozens-Hardy*; namely, that the effect of the proviso is to make an alternative gift. I confess I cannot treat it as an alternative gift; I cannot see that it is framed from that point of view at all. I understand by an alternative gift, a gift to *A.* in one event and in another event to *B.* I do not understand an alternative gift to be a gift to *A.*, and then, if some event happens, a shifting from *A.* to *B.* I cannot read this as anything more than a proviso for shifting the order in which previous limited estates are to take effect. It is like a direction to a printer to transpose sentences. You have the sentence transposed from one part of the manuscript or proof to another. Applying that view to the proviso you have the enjoyment of the gift postponed, defeating all people who might have an interest afterwards and also all people actually in enjoyment. The proviso is so used that it is a mere accident whether the estate so taken away, or defeated, or modified, or postponed if you like, happens to be an estate in actual possession or enjoyment, which is not the case here, or whether it happens to be a vested estate, which is the case here. It is to my mind as clear a divesting clause as possible. Whether you put in the words "shall cease or determine" or whether you

C. A.
1893
MILBANK
v.
VANE.
Lindley, L J.

leave them out does not affect the real operation of that clause, which is a clause defeating the estate tail which was given by the will.

There is a difficulty about the question, and if the point were new we might have to consider it further. The difficulty is that this divesting clause may take effect not only so as to defeat the estate tail but the estates of parties taking for life, and it is by reason of that circumstance that the argument has been addressed to us that the Plaintiff's estate is not an estate in defeasance of an estate tail, but that it is an estate prior to the estate tail which has been barred. Now, whatever difficulty there might be before the case of *Doe* v. *Earl of Scarborough* (1), let us see whether this is not precisely the point upon which the decision of that case really depended. It becomes clear when you contrast *Roper* v. *Hallifax* (2) with *Doe* v. *Earl of Scarborough.*

The short note of *Doe* v. *Earl of Scarborough* is to be found at p. 18 of the report of the case in the Court of Exchequer: "The present case is thus. *A.* for life. Trustees to preserve. *C.* in tail. Proviso that on a given event taking place during the life of *A*,"—that was the real difficulty in *Doe* v. *Earl of Scarborough*—"certain of the old uses shall cease, and new ones take effect." Now, to shew that this was one of the main points before the Court and a difficulty which they had to deal with, I will refer to Sir *William Follett's* argument on the appeal to the Exchequer Chamber (3). He says: "A recovery bars, not only remainders expectant upon the estate of the party suffering the recovery, but collateral limitations which would have the effect of determining that estate. It is true that it does not bar estates antecedent to the estate of such party, nor charges upon his estates. It is contended, on the other side, that the proviso is annexed to the life estate, and therefore interposed antecedently to the remainder in tail. But it is not confined, in its operation, to determining the life estate; it puts an end also to the remainder in tail. . . ." That was his argument, and it was adopted by *Tindal*, C.J., in giving judgment (4). I cannot read *Doe* v. *Earl of Scarborough* without seeing that a

(1) 3 A. & E. 2, 897.
(2) 8 Taunt. 845.
(3) 3 A. & E. 914.
(4) Ibid. 972, 973.

proviso of this kind, such as the Court had to deal with there, and such as we have to deal with here, is a proviso within the meaning of sect. 15 defeating the estate tail, and not the less because it also affects the estate for life. I pass by the question whether the effect of the proviso is to create new estates. I cannot read this proviso as anything more than a divesting clause. A doubt which might have arisen before *Doe* v. *Earl of Scarborough* (1) has been removed by that decision, which has existed now for sixty years or more, and is, I think, very unlikely to be disturbed. This appeal ought to be dismissed.

KAY, L.J. :—

I am of the same opinion. I am quite unable to distinguish this case from *Doe* v. *Earl of Scarborough*. With respect to the operation of the statute I will quote words used by Lord *St. Leonards* (*Sugden's* Real Property Statutes (2)). He says, referring to sect. 15 of the Act: "The disposition is made a bar to all persons whose estates are to take effect after the determination, or in defeasance of the estate tail, saving estates prior to the estate tail. This will no doubt be construed to mean the same operation which the old law gave to a common recovery, although it is difficult to accurately define the operation; nor do these words afford an accurate definition, for there are many estates which take effect in defeasance of the estate tail, which a disposition under the statute will not bar, but then they will be treated, as they in strictness are, as estates prior to the estate tail. However, all estates which, properly speaking, do take effect in defeasance of the estate tail, will be barred by a statute deed, therefore an executory or shifting limitation over after an estate tail, to take effect in defeasance of, and not to await the regular determination of the estate tail, will be barred." I believe that to be a perfectly accurate description of the effect of this section, and there has been no authority which has in any way impugned the accuracy of that statement. In *Doe* v. *Earl of Scarborough* the case was this: there was a limitation of an estate for life, with remainder over in tail, and with various

(1) 3 A. & E. 2, 897. (2) 2nd Ed. p. 193.

C. A.
1893
MILBANK
v.
VANE.
Kay, L.J.

remainders over. There was a proviso that on the happening of a certain event a particular life estate with remainder in tail should cease and determine as though the tenant for life had died without issue, the effect of which was, according to the language used in the judgments, when the event happened, to blot out of the limitations that estate for life and the immediate estate tail in remainder after that estate, and to leave the other limitations to take effect just as if that estate for life and the remainder in tail had never been limited at all. What happened in *Doe* v. *Earl of Scarborough* (1) was this: the tenant in tail in remainder before either estate had vested in possession, with the concurrence of the previous tenant for life, suffered a common recovery, and the tenant to the præcipe was made by the actual tenant for life in possession, and the question was, What was the effect of that common recovery? It was held that it barred all the estates in remainder after the vested estate tail in respect of which the recovery was effected. After that common recovery had been effected and during the life of the tenant for life, who by joining in making the tenant to the præcipe joined in and consented to the common recovery, the event contemplated happened, and therefore, if the recovery had not been suffered the estate for life and the estate tail in remainder would have been blotted out of the settlement. The remainderman next after that estate tail asserted that the common recovery had not prevented that happening, because the event occurred, not during the estate tail but during the life of the tenant for life. But the answer was that the recovery destroyed all the subsequent estates in the settlement; that if the claim was in respect of some new estate the argument might be a good one, but the claim in fact was in respect of one of the old estates in the settlement, and the operation of this proviso being merely to accelerate the position of that old estate in the limitation, and that old estate having been destroyed by the recovery, the right claimed could not successfully be asserted. As I understand, that was the point which made the Exchequer Chamber lay so much stress upon the fact that the estate in respect of which the plaintiff in that case was claiming was not a new estate, but was one of the

(1) 3 A. & E. 2, 897.

old estates in remainder after the estate tail in respect of which the recovery had been executed.

Now is this case in any way different? Mr. *Cozens-Hardy*, in his reply, admitted that the effect of the proviso in the present case was not to make the estate in respect of which he is now claiming, which is the next estate in remainder, a new estate. He says it is not. He admits it is the old estate, and I entirely agree. It seems to me impossible to say it is a new estate; it was an old estate in the limitation, and if that estate was destroyed by this disentailing deed, then there is no estate in respect of which the Plaintiff can claim the right he is claiming in this case. The Plaintiff's counsel ingeniously attempted to escape from that result by saying that this was not an estate in remainder, but that the proviso made it an alternative estate, that is to say the limitations must be read as though they were worded somewhat like this:—"if a particular event shall not happen the estate shall go in remainder to *Frederick* for life, then to his first and other sons in remainder, and if that event shall happen it shall go, not to him, but to the next remainderman, who would be *Henry John Milbank*, for life, with remainder to his first and other sons in tail." The point is very well worth considering; but no one ever heard of an alternative limitation in such words as are used in this proviso. Supposing the event had happened after the tenant for life, *F. A. Milbank*, who joined in the disentailing deed with his son had come into possession, the effect of the event happening would be, if there was no disentailing deed, to divest that estate which was actually in possession. That is one possible and not improbable effect of the proviso. You cannot, therefore, treat this proviso as being an alternative limitation, because after this life estate and estate tail in remainder have vested, but before either of them comes into possession, the event may happen and divest the vested estate. When you have alternative limitations neither of the limitations vests until the happening of the event which creates the alternative; but in this case beyond all question *Frederick Acclom Milbank's* life estate with remainder over to his first and other sons in tail, had vested at the time the disentailing deed was executed; and, if the event had happened at any time after

C. A.
1893
MILBANK
v.
VANE
Kay, L.J.

that estate had vested, the effect would be to divest estates which had previously vested. Therefore it seems quite clear that you cannot treat this as an alternative limitation, but that it must be treated as a clause, the effect and operation of which would be to divest vested estates. It is really a clause of defeasance and the actual effect and operation of it is to blot out from the place in which they were the limitations to *Frederick Acclom Milbank* for life, with remainder to his first and other sons in tail, and to "postpone" them—to use the language of the clause—that is, to bring them in later on in the limitations. The effect is simply to accelerate the limitations next after them, not to give any new estate to the persons who take under those limitations. *Doe* v. *Earl of Scarborough* (1), in my opinion, applies exactly to this case. The estate in respect of which this claim is made was destroyed by the disentailing deed. *Doe* v. *Earl of Scarborough* was decided by the Exchequer Chamber as long ago as the year 1836, and has, as far as I know, never been doubted from that day to this to be the proper statement of the law on the subject. I therefore think this appeal fails and should be dismissed.

LORD ESHER, M.R.:—

It seems to me that the case of *Doe* v. *Earl of Scarborough* governs the present case in two particulars; that it governs what is the true construction of the will and the proviso; and, having arrived at that true construction, it governs the application of the statute to it. I think that *Doe* v. *Earl of Scarborough* is an authority which justifies each and every successive sentence of the judgment of Mr. Justice *Kekewich*.

Solicitors for Appellant: *Horn & Francis.*

Solicitors for Respondents: *Trower, Freeling, & Parkin; Finch, Jennings, & Finch; Dawson, Bennett, & Dawson.*

(1) 3 A. & E. 2, 897.

W. A.

In re WASHINGTON DIAMOND MINING COMPANY.

C. A.
1893
VAUGHAN WILLIAMS, J.
Jan. 28.
C. A.
April 12; *May* 31; *June* 12.

Company — Winding-up — Fraudulent Preference — Set-off — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

U., a director of a company, held shares not fully paid up, and his directors' fees were unpaid. The company was admittedly in embarrassed circumstances. On the 21st of July, 1891, on which day the company's balance at its bankers was £2 0*s.* 11*d.*, *U.* gave to the company a cheque for £70, the amount remaining unpaid on his shares, and received at the same time from the company a cheque for a like amount on account of his fees, signed by himself and *M.*, another director. Within three months a winding-up petition was presented, on which a winding-up order was made. The liquidator took out a summons for an order on *U.* and *M.* to pay the £70 to him on the ground that its payment was a fraudulent preference:—

Held, that in applying sect. 48 of the *Bankruptcy Act*, 1883, to limited companies in pursuance of sect. 164 of the *Companies Act*, 1862, the special legislation applicable to such companies must be regarded, and that though a set-off of mutual debts within three months of the bankruptcy of an individual is not a fraudulent preference, such a set-off within three months of the presentation of a petition to wind up a company is a fraudulent preference, inasmuch as the right of set-off continues in bankruptcy, but not in winding-up:

Held, further, on the facts, that the payment was a fraudulent preference, and that *U.* and *M.* must pay the amount.

THE *Washington Diamond Mining Company* was formed for the purpose of working some mines in *South Africa*, and was registered on the 29th of June, 1889. The nominal capital was £100,000 in £1 shares. The articles provided that the directors might make such calls as they thought fit upon the members in respect of all moneys unpaid on their shares, provided that no call should be made payable within one month after the last preceding call was made payable. The directors were authorized to receive from any member willing to advance the same all or any part of the moneys payable on his shares beyond what had been called up, such advance to be made either as a loan repayable or as a payment in advance of calls.

The 54th article provided that the first directors should be those who were nominated or elected by the majority of the

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY

signatories to the memorandum and articles of association, and such other persons as after the first allotment and before the first general meeting should be appointed by the directors.

The 56th article provided that the qualification of a director, other than the directors mentioned in article 54, should be the holding of 200 shares. The remuneration of a director was fixed by the articles at £150 per annum.

M'Keand was one of the first directors, and took 100 shares, in respect of which, at the time of the transaction impeached by the present proceeding, he had paid £30 in calls.

Colonel *Underwood* was elected a director on the 3rd of March, 1890. He never held 200 shares, and the question was raised whether he was duly constituted a director so as to become entitled to remuneration. He took 100 shares, in respect of which he paid, before the transaction complained of, £30, leaving £70 unpaid. The question whether he was duly constituted a director turned upon the meaning to be given to the "first general meeting" in article 54, and is not reported, as it depended on the construction of the articles.

On the 21st of July, 1891, at which time the balance standing to the company's credit at their bankers' was £2 0*s.* 11*d.*, *M'Keand* gave the company his cheque for £70 to pay up his shares, and the company gave him a cheque for £70 on account of his fees, payable to his order, and signed by himself and Colonel *Underwood.* The amount payable on the cheque given by *M'Keand* was received by the company's bankers on the 28th of July, and the cheque in his favour was cashed on the 1st of August.

On the same 21st of July, Colonel *Underwood* gave the company his cheque for £70 to pay up his shares, and received at the same time a cheque on the company's bankers for £70 on account of his fees, payable to his order, and signed by himself and *M'Keand.* The company's bankers received the amount payable on his cheque on the 28th of July, and cashed the cheque in his favour on the 31st.

At the time of these transactions no calls had been made in respect of the moneys remaining unpaid on the shares of Colonel *Underwood* and *M'Keand* respectively.

On the 5th of September, 1891, a petition to wind up the company was presented, on which a winding-up order was made on the 9th of April, 1892.

On the 13th of December, 1892, the liquidator took out a summons, asking (*inter alia*) that Colonel *Underwood* and *M'Keand* might be ordered to pay to the liquidator the £70 received by Colonel *Underwood* as having been improperly paid to him on account of his fees when he was not qualified to act as a director and knew the company to be insolvent, and that Colonel *Underwood* and *M'Keand* might be ordered to pay to the liquidator the £70 paid to *M'Keand* for directors' fees when he knew the company to be insolvent.

The evidence shewed the company to be in an embarrassed condition in July, 1891. The view taken by the Court below of this evidence is found in the judgment of Mr. Justice *Vaughan Williams*.

The case turned upon the *Companies Act*, 1862, s. 164 (1), and the *Bankruptcy Act*, 1883, s. 48 (2).

The summons was heard before Mr. Justice *Vaughan Williams* on the 28th of January, 1893.

(1) Sect. 164: "Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of bankruptcy in the case of an individual trader; . . ."

(2) *Bankruptcy Act*, 1883, s. 48: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

C. A
1893
In re WASHINGTON DIAMOND MINING COMPANY

Buckley, Q.C., and *Kenyon Parker*, for the liquidator:—

By sect. 164 of the *Companies Act*, 1862, these payments were bad. The two questions to be considered are—(1.) whether the company was then unable to pay its debts as they became due with its own money; and (2.) whether the payment was made with a view to a preference.

When an insolvent company gives security to a director who knows the state of its affairs, for a debt due to him, such security will be set aside although the director has pressed for payment: *Gaslight Improvement Company* v. *Terrell* (1). Where a person is in the double position of a debtor and creditor, the motive proves itself. In the present case the amounts due to the directors were not ordinary debts, but debts due to them in their character as members of the company, and they were postponed to outside creditors: *Companies Act*, 1862, s. 38, sub-s. 7; *Ex parte Cannon* (2).

"Insolvency" in these cases means commercial insolvency, and the drawing of the cheques in favour of the directors was a misapplication of the company's money.

Moreover, *Underwood* was never duly qualified to act, and never was a director; so that no debt of any kind was due to him.

Farwell, Q.C., and *J. G. Wood*, for Colonel *Underwood*:—

If the contention of the liquidator is right, no director could pay himself a debt due from the company until all the other liabilities of the company had been discharged. Of course, he may set off what the company owes him against a debt due to him from the company. *Ex parte Cannon* was not followed by Mr. Justice *Kay* in *In re Dale and Plant* (3), where it was held that arrears of salary due to a managing director of a company in which directors were obliged to be shareholders were not a debt due to him in his character of a member. If the company sued a director for calls and he set up a defence of set-off for fees due, it would be no answer that the company might be wound up within three months. It is not every payment, even to a director, that is a preference within the section. *Adamson's*

(1) Law Rep. 10 Eq. 168. (2) 30 Ch. D. 629.
(3) 43 Ch. D. 255.

Case (1), *Poole, Jackson, and Whyte's Case* (2), *Willmott* v. *London Celluloid Company* (3), *Mason, Gallagher, and Slater's Case* (4), and *In re A. M. Wood's Ships' Woodite Protection Company* (5), all shew that debts due to directors may be applied to wipe off sums due from them in respect of unpaid shares.

Ex parte Cannon (6) is commented on in *Buckley* on the *Companies Acts* (7). It is plain that *Underwood* was a director. He was a first director under art. 54. The articles do not refer to the statutory meeting under sect. 39 of 1867, but the first meeting after allotment. He was invited to act as a director on the assumption that no first meeting had been held, and the company is bound by that.

F. Dodd, for *M'Keand*:—

There is no evidence of payments being made with a view to a preference. The evidence in fact shews that *Underwood* and *M'Keand* supposed the company to be solvent. The winding-up order was only made by the Court of Appeal.

[VAUGHAN WILLIAMS, J., referred to *Black & Co.'s Case* (8), and *In re Whitehouse & Co.* (9).]

As already pointed out, there would have been a good set-off in an action by the company before winding-up, and there is nothing here to put the liquidator in a better position than that occupied by the company.

Buckley, in reply.

VAUGHAN WILLIAMS, J.:—

In this summons three distinct classes of claim are involved. First, there is a claim that certain moneys were paid by the Respondents by way of fraudulent preference, and it is sought to charge the directors who so paid those sums with those amounts, and to make them repay them to the liquidator. Secondly,

(1) Law Rep. 18 Eq. 670.
(2) 9 Ch. D. 322.
(3) 31 Ch. D. 425; 34 Ch. D. 147.
(4) 30 W. R. 378.
(5) 62 L. T. (N.S.) 760.
(6) 30 Ch. D. 629.
(7) 6th Ed. p. 142.
(8) Law Rep. 8 Ch. 254.
(9) 9 Ch. D. 595.

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY.
Vaughan Williams, J.

there is a charge, also based on fraudulent preference, by which it is sought to recover those sums of money from the directors who actually received those amounts. Then there is also a claim to recover from Colonel *Underwood* the amounts that he has received, not only on the ground that the payment of those sums to him amounted to a fraudulent preference, but also on the ground that those amounts ought never to have been paid to him at all because he never was a director.

The articles of association provide for the qualification of the directors, and that qualification seems to be, except in the case of first directors, a condition precedent to their filling the office. It is said that Colonel *Underwood* was not a first director, and that consequently it was necessary for him to have this qualification of 200 shares, and that he never had that qualification.

I will first deal with the question of fraudulent preference. The question whether in this case it has been proved that there was a fraudulent preference by these directors really turns upon the 48th section of the *Bankruptcy Act*, 1883, because that section is in effect incorporated into the *Companies Acts* by virtue of the 164th section of the *Companies Act*, 1862.

That being so, the first thing one has to do is to see whether the payments alleged constitute a fraudulent preference which occurred within three months of that which must be taken to be the act of bankruptcy—the commencement of the liquidation in the case of a company. As to that, there is no dispute that the payments, if they were payments by way of fraudulent preference, did occur within the time limited by the 48th section of the *Bankruptcy Act*, 1883. That being so, I have to consider whether the company was unable to pay its debts as they became due from the moneys of the company, and whether the payment to these directors was a payment made with the view of giving them, as creditors, a preference over the other creditors. Now, in coming to a determination as to whether the payment was made with the view of preferring the creditors to whom it was made, it is necessary that one should take into consideration and bear in mind what in point of fact was the financial position of this company. Perhaps the proper conclusion to come to in any case might be that the company must be unable to pay its debts

from its own moneys as they became due, and I quite agree that the company might be properly held to be in that position although it might have locked up a large amount of capital which, if it were given time, would be available for the payment of its creditors. Notwithstanding that state of things, the company might be described as being, within the words of this section, unable to pay its debts as they became due from the moneys of the company. But although the fact that the company has money locked up which might be available at a later period for the payment of its debts cannot be considered for the purpose of excluding the company from falling within the category, yet when you come to deal with the question whether the payment was made with the view of giving the creditors a preference, it is quite obvious that one cannot for that purpose leave out of consideration the fact, if it was a fact, that the directors might well anticipate that they would be able to get in moneys of the company in sufficient time to render it extremely improbable that they would be driven to a liquidation of the company's affairs by a winding-up; because it is much less likely that directors would seek to give a preference to creditors in such a case than it would be in a case where the condition of the company was such that it must have been plain to the directors themselves that a stoppage of payment or winding-up was inevitable.

I have purposely here spoken of companies in the abstract because I have not at present expressed any opinion as to what was the position of this particular company. I do not feel that I really have here as full information with regard to the circumstances of this company as might have been laid before me. I called the attention of Mr. *Buckley*, as counsel for the liquidator, to this fact, in order that he might, if he thought fit, make an application to me to place further facts before me than those which appear upon the affidavits which have been filed; but he elected to stand upon the evidence as it was, and it is therefore with that evidence that I must deal.

Now, the circumstances of this company seem to be these. Mr. *Rudd*, the vendor, seems to have sold the company the property with which they were to deal. The company were to pay

C. A
1893
In re WASHINGTON DIAMOND MINING COMPANY
Vaughan Williams, J.

a large sum—£46,000, I think—in shares and a sum of £3000 in cash. That arrangement was afterwards altered, and Mr. *Rudd* agreed to take in payment £3000 in bills of exchange falling due at intervals, and also debentures, which were to fall due, if I remember rightly, in the year 1906. Those debentures contained a clause whereby the sum secured by them would become payable immediately in case there was default in the payment of the interest on the debentures. I have no evidence before me that any default has been made in the payment of the interest on those debentures.

Under these circumstances, it seems to me that I have no right to assume that there was any debt payable by the company at the time of the payments complained of other than the debt due to Mr. *Rudd*. With regard to the debt due to Mr. *Rudd*, in my judgment, the intention of the parties was that he should not sue in respect of those acceptances so long as the interest was paid on those debentures and the amount secured by the debentures remained not due. But whether this was so or not, I think that, at all events, the directors may well have taken that view of the matter; and when I have to deal with the question of what the intention of these directors was, it really is not so important to consider whether there was or was not a legal liability which could be immediately enforced for this debt due to the vendor, as to consider whether the directors, at the moment that they made the payment, had any reason to suppose that there was any outstanding debt which they would be unable to pay if called upon so to do. It seems to me that if the directors had reasonable ground to believe, and did believe, that they would not be called upon to pay this amount, that in itself is a fact to be taken into consideration as regards shewing an intention to prefer. The matter then stands thus. It is extremely doubtful whether there was any debt due from this company, at the moment when these payments to directors were made, which it was unable to pay as it became due, because it is extremely doubtful whether under these circumstances there was any debt which the vendor could have enforced at that moment, there being no evidence that at that time there had been any default in the payment of the

interest due upon the debentures. Moreover, it is a matter which is extremely material in considering whether the directors had a view to prefer their fellow directors in making these payments, that the directors certainly in my judgment did not at this time anticipate as a matter of fact any pressure from any creditor whatever. In other words, they did not expect any pressure from this gentleman, who seems to have been the only creditor at that time.

I wish at this point to call attention to what it seems to me it is essential for the liquidator to prove in this case in order to substantiate his claim. At the time when these payments were made there was in existence in each case—I am assuming for this purpose that Colonel *Underwood* was a director—a cross-indebtedness; that is to say, each director was indebted for calls in respect of shares held by him in the company, and each director had owing to him a sum of money for directors' fees. The sum of money due in each case for directors' fees exceeded the amount which was due for calls.

Now, let me look at this matter first, apart from the fact that the insolvent entity in this case is a company and not an individual. If this entity had been a person, and, at a time when that person was unable to pay his debts as they became due, if he was to his own knowledge unable to pay his debts as they became due, a payment had been made by such person to a creditor of his to whom also he was indebted in a cross-amount—I do not think that the payment could be said to be a payment by way of fraudulent preference, because in a case of that description the creditor has a commercial right to say: "I am your creditor; I am also your debtor; and I elect to appropriate the sum that you owe me in payment of the sum that I owe you." I do not say that as a matter of law the creditor would have a right as against the wish of the debtor to pay his debt by such an appropriation of his own indebtedness to his debtor; but although he might not have a legal right to do so, it is plain that he could by taking the proper steps bring about that result. He has only to sue his debtor for the amount that is due to him, and the debtor would under those circumstances be bound to resort to the set-off in discharge of

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY
Vaughan Williams, J.

that claim. Under those circumstances I must say that, if in this case, instead of the insolvent being a company, the insolvent had been an individual, I should not on these facts have been disposed to find that there was any fraudulent preference whatever.

But then it is said, and I think it is rightly said, that the case of a company does not stand on the same footing, and that there is this difference. In the case of an individual, if he become bankrupt, the security, by way of set-off of the creditor, would continue notwithstanding the bankruptcy, and therefore the debtor by paying it could not be said to prefer him, because he would put him in no better position than he would be in if bankruptcy supervened. You cannot prefer a man, it seems to me, by merely putting him in the very position in which he would be if a bankruptcy followed. But that is not so, as I understand, in the case of a company. The result of a winding-up would be that the claim for calls on shares would become a claim by the liquidator against which a shareholder could not set off any claims which he might have against the company.

Under those circumstances, it is quite plain that the directors might put the creditor-shareholder in a better position by immediately making a payment to him in return for a cross-payment or by settling in account with him; because they would give him the benefit of a set-off—a benefit which he would not get as against the liquidator in the event of a winding-up or liquidation following.

That is what I understand to be the result of the law as laid down in *Black & Co.'s Case* (1) and in *In re Whitehouse & Co.* (2). But in my view, although I think that I might draw an inference of an intention to prefer a creditor in the case of a company by reason of the directors of the company having shortly before the liquidation given the creditor the benefit of a set-off—which inference I could not draw in the case of an individual creditor, because the individual creditor would have continued to have the benefit of the set-off, notwithstanding the bankruptcy—yet I think that I ought not under these circumstances to draw the inference of intending to prefer, unless I think that those

(1) Law Rep. 8 Ch. 254. (2) 9 Ch. D. 595.

who made the payment were contemplating the happening of that state of things which alone would destroy the creditors' right of set-off.

For the reasons that I have already given, I do not think that I ought to draw that inference. I do not think that, having regard to the debts owing by the company—having regard to the claims that were being made upon them, or rather, which were not being made upon them—I ought to draw the inference that these persons contemplated the happening of that state of things. I am quite aware that the balance of this company at its bankers had for a long time been ludicrously low; but at the same time there was a very large amount of calls unpaid, and, as far as I can judge, the directors honestly believed that they were likely to get paid those calls. At all events, in the case of Mr. *Counsell*, who was one of those who was liable to pay calls, his liability being to the extent of £900, they were right in supposing that they would get payment. I do not know how far I ought to rely upon the liquidator's list of contributories and his observations or comments on it. I have no doubt that, to a large extent, it will turn out that the claims for unpaid calls are worth nothing; but I do not know how far the directors knew that at this time. I gather from what I find in the minute-book that they at that time believed that many others besides Mr. *Counsell* were not only liable to pay, but would, in fact, if pressed, pay the amounts of the calls due from them on their shares.

Therefore, as a matter of fact, I decline to draw the inference that the directors, when they made these payments, had any intention of preferring the directors, or had any intention of putting these directors in a better position than other persons. Unless a winding-up was to follow, the payment did not, in fact, put them in any better position than other creditors falling within the same category—that is to say, any other creditor who had a cross-claim which he could set off against calls. It is true, as I have said, that the case of a payment to creditors in this position would be the same as payments to other creditors; but I do not think at this time these persons contemplated or anticipated a winding-up at all. I have only to add this, that it seems to me from the minute-book that everything which was done in respect

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY
Vaughan Williams, J

of the payments by the directors of their cheques for calls and the appropriation of those sums to directors' fees was a matter which was arranged amongst the directors. I see no harm in the arrangement apart from any contemplation by them of a winding-up. It seems to me that it was a right and proper thing that a director should say, "These sums are due to me, and I will set them off to meet my liability upon my shares."

Taking this view of the case, I do not know that it would serve any useful purpose that I should go into the cases—*Poole, Jackson and Whyte's Case* (1) and *Willmott* v. *London Celluloid Company* (2)—because upon the conclusion of facts to which I have come it is not necessary to do so.

[His Lordship then disposed of some minor points, and stated his opinion to be that Colonel *Underwood* had been duly appointed a director so as to become entitled to fees. The summons, therefore, was dismissed as regarded the sums paid to Colonel *Underwood* and *M'Keand.*]

F. E.

C. A.

The liquidator appealed. The appeal was opened on the 12th of April, and was adjourned in order that further evidence as to the state of the company's affairs in July, 1891, might be furnished. Evidence was adduced, the effect of which is stated in the judgments of the Court of Appeal.

May 31. *Buckley*, Q.C., and *Kenyon Parker*, for the appeal:—

The evidence shews that in July, 1891, the company was in the most hopeless condition, and unable to pay even small bills when it was pressed for them. The set-off of these demands, a winding-up petition having been presented within three months, is a fraudulent preference. This set-off was made with a view to give a preference to these directors.

[The Court referred to *Ex parte Hill* (3), as shewing that a desire to give the creditor an advantage over other creditors need not be the sole motive.]

We do not lay stress on the question whether *Underwood* was

(1) 9 Ch. D. 322. (2) 34 Ch. D. 147.
(3) 23 Ch. D. 695.

properly elected a director. We ask for an order against Colonel *Underwood* and *M'Keand* in respect of both sums.

Farwell, Q.C., and *J. G. Wood*, for Colonel *Underwood*:—

To establish fraudulent preference there must be a fraudulent intention. Here the directors honestly believed that the company would go on, and did not contemplate a winding-up. Their object in the transaction was to get rid once for all of their liability to pay calls on their shares. Then sect. 164 of the *Companies Act*, 1862, enacts that an act which if done by an individual trader would have been a fraudulent preference shall be so if done by a company—it goes no further. Now, this set-off could not have been impeached as a fraudulent preference in the bankruptcy of an individual; it therefore cannot in the case of a company which is in winding-up.

[KAY, L.J.:—That seems to be following the letter of the Act without regard to its spirit. Does not the section mean that anything done with the view of giving a creditor an advantage over other creditors shall be void as a fraudulent preference?]

That would be a very scientific enactment; but it is not what the statute has said. The set-off was equivalent to a payment in cash: *Spargo's Case* (1).

F. Dodd, for *M'Keand*:—

I cannot dispute "that the company was not able to pay its debts as they became due" out of its own moneys; but I say that it is not shewn that the payments were made with a view of giving the directors a preference—they believed that the company would go on.

[LINDLEY, L.J., referred to *Sykes' Case* (2) as analogous to the present.]

Mason, Gallagher and Slater's Case (3), which first decided that sect. 164 refers to the bankruptcy law for the time being in force, is in our favour on the question whether the directors who signed the cheques were guilty of misfeasance.

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 13 Eq. 255.
(3) 30 W. R. 378.

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY

Kenyon Parker, in reply:—

In *Kent's Case* (1), Lord Justice *Cotton* held that sect. 164 cannot have imported into it the 38th section of the *Bankruptcy Act*, 1883. That decides the present case.

1893. June 12. LINDLEY, L.J.:—

This is an appeal by the liquidator of this company against an order of Mr. Justice *Vaughan Williams*, dismissing an application made by the liquidator against Colonel *Underwood* and Mr. *M'Keand*, two of the directors of the company. The application was for an order to compel them to repay to the company two sums of £70 each. These sums were paid by the two gentlemen in question to the company in respect of the amounts unpaid on the shares held by them, and were immediately repaid by the company to them in respect of arrears of fees due to them as directors. The repayments are alleged by the liquidator to have been invalid under sect. 164 of the *Companies Act*, 1862, which relates to fraudulent preferences. Mr. Justice *Vaughan Williams* held that no fraudulent preference was established. Hence the appeal.

The appeal raises some questions of fact, and also an important question of law. The questions of fact are—(1.) whether the directors paid themselves their fees at a time when the company was unable to pay its debts as they became due; and (2.) whether they paid themselves with a view to give themselves a preference over other creditors of the company (2). The question of law is whether the mutual credit clause, sect. 38, in the *Bankruptcy Act*, 1883, is to be applied to cross-claims between a limited company and its members in respect of calls, so as to render valid a payment by the company, which but for that clause, would be a fraudulent preference.

The facts are as follows. [His Lordship stated some of the most striking features as to the position of the company in July, 1891, and proceeded:—]

On the 21st of July, 1891, the balance at the company's credit was reported to be £2 0*s.* 11*d.* At that time *Farmer* had

(1) 39 Ch. D. 259, 266-7. (2) Sect. 48 of the *Bankruptcy Act*, 1883.

resigned his appointment as solicitor; his bill amounted to £215; he offered to take £100 in satisfaction of his claim, and the secretary informed him on the 22nd of July that the company was not in a position to make any payment at present. The proof that the company was unable to pay its debts as they became due from its own money is overwhelming. The company's own money, in fact, consisted of what it could get from its shareholders and those who had underwritten its capital, and they would not pay. One of them, however, a Mr. *Counsell*, afterwards paid £900 into Court in the winding-up of the company, and this may be regarded as a good asset, though not available in July, 1891. It is true that the vendors and some of the other creditors were not pressing for payment; but *Farmer* was, and the Government claims for royalties required immediate attention, as the mines were in danger of being forfeited.

Such being the financial position of the company, Mr. *M'Keand*, one of the directors, on the 21st of July, 1891, paid £70 to the company, being the amount due on his shares, and on the same day the company paid him a cheque for £70 on account of his fees. At the same time similar payments were made by and to Colonel *Underwood*, another director. On the 5th of September a petition to wind up the company was presented by *Counsell*, a shareholder, and the company is being wound up under an order made on this petition.

These payments by the company were made by cheques signed by Colonel *Underwood* and Mr. *M'Keand*.

It is clear enough what each of the transactions impeached in truth was. It was an attempt by these directors to pay up their shares in full without really parting with any money. I will assume that each of them owed the company £70 in respect of his shares, but the company owed him £70 for fees. If the company could have paid him his fees, and had paid them, he could have applied the money so paid to him in paying up his shares, and all would have been well. So, if the company had had the money with which to pay him his fees, the cases shew that it would have been unnecessary to go through the form of paying him for them by a cheque, and taking back the same

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY.
Lindley, L J.

cheque, or another of the same amount, for the sum due from him on his shares. If the company had had the cash with which to pay him his fees, an assent to set them off against what he owed the company, and a set-off accordingly, would be equivalent to a payment in cash of each of the cross-demands: see *Spargo's Case* (1). Although even then a question of fraudulent preference might arise if the company were wound up in three months. But in this case the company had no means whatever of paying Mr. *M'Keand* or Colonel *Underwood* his fees, unless he furnished the funds by first paying up his shares. Each of them accordingly did so. He paid them up in cash; but then the money he paid to the company became the company's money, and he was a mere creditor of the company for his fees. He was not entitled to be paid those fees in preference to any other creditor, but he and his co-directors pay him in full when they know that *Farmer* is pressing, and that the non-payment of the royalties jeopardizes the property of the company, and that the company has not a sixpence available to pay any of its debts. The circumstances are such as to drive me to the conclusion that Mr. *M'Keand* and his co-directors acting for the company made these payments of £70 to Mr. *M'Keand* and Colonel *Underwood* deliberately to give them a preference over the other creditors of the company, and thereby to refund to them the £70 which they had paid the moment before in respect of their shares.

In fairness, however, to these directors, I will say that, although I have no doubt that they made these payments with a view to prefer Mr. *M'Keand* and Colonel *Underwood*, yet that preference was not the ultimate object they had in view. The preference was only a means to an end, the end being to relieve them from the necessity of providing cash out of pocket in order to pay up their shares. The exchange of cheques was only a mode of setting off the amount due to them for fees against the amount due on their shares. The transaction, and the payment to them, would have been lawful and valid if the company had not been ordered to be wound up on a petition presented within three months after the payment; but the payment to them is

(1) Law Rep. 8 Ch. 407.

made unlawful and void by the winding-up proceedings within that time. Whether the directors expected a petition so soon I do not know, nor need I inquire: *Ex parte Griffith* (1); *Ex parte Hill* (2). As regards Colonel *Underwood* it was also contended that, owing to some defect in his appointment or qualification, he was not entitled to any fees. But it is unnecessary to examine this point, and I therefore pass it over.

But now comes the question of law. If the company were an ordinary bankrupt trader to whom the mutual credit clause (sect. 38) of the *Bankruptcy Act*, 1883, was applicable, the preferential payments to Mr. *M'Keand* and Colonel *Underwood* could not be avoided by the trustee in bankruptcy, because they would have injured no one. The two debts could have been set one against the other after the bankruptcy just as effectually as before, and whether the debts were both paid or were set off against each other before the bankruptcy or after would be perfectly immaterial. This being unquestionably true of ordinary traders, it is contended that sect. 164 of the *Companies Act*, 1862, is so worded as to involve the same consequence on the winding-up of a company, which must for this purpose be treated as a bankrupt trader. This argument is certainly ingenious, but to give effect to it would be to defeat those sections of the *Companies Act*, 1862, which prevent all set-off against calls on the winding-up of a limited company so long as any of its creditors are unpaid. See sect. 38, sub-sect. 7, and sect. 101; *Grissell's Case* (3). Sect. 164 is a general section applicable to all the creditors of all companies governed by the Act, whether they are limited or not, and whether the creditors are members or not; its language is, therefore, wide enough to include all creditors of all companies governed by the Act. But, in applying the section to limited companies and to the members of such companies, the special legislation applicable to them must be regarded and must not be defeated. The first part of sect. 164 must be construed as referring to the class of acts described in sect. 48 of the present *Bankruptcy Act*, 1883; and the words "any trader" in sect. 164 must be held to include traders to whom the mutual credit clause

(1) 23 Ch. D. 69. (2) 23 Ch. D. 695.
(3) Law Rep. 1 Ch. 528.

C. A
1893
In re WASHINGTON DIAMOND MINING COMPANY.
Lindley, L.J

in the *Bankruptcy Act*, 1883, s. 38, is inapplicable, as well as to include those traders to which the clause is applicable. This construction does no violence to the language used, and is obviously required by those sections of the Act which expressly prevent a member of a limited company in arrear for calls from obtaining payment in full of debts due to him in preference to other creditors. The disallowance of a set-off against calls between a limited company and its members on a winding-up is to prevent any such preference, and its prohibition removes the only reason why a preferential payment in bankruptcy, where a set-off is allowable, is not fraudulent and void. The maxim *Cessante ratione cessat lex* is properly applicable in such a case. This construction of sect. 164 is not new; it was seen to be right and was distinctly adopted by Lord Justice *Cotton* in *Kent's Case* (1), and it is the only construction which does not defeat the obvious intention of the Legislature. It must be borne in mind that it has been already decided that sect. 10 of the *Judicature Act*, 1875, has not repealed or affected the enactments in the *Companies Act*, 1862, prohibiting set-off against calls in the winding-up of limited companies: see *Gill's Case* (2). In considering this case I have assumed that the sums paid by Mr. *M'Keand* and Colonel *Underwood* were really due and payable by them to the company, although no calls had been made as contemplated by the articles of association. I am by no means sure that this is not taking too favourable a view of the position of these gentlemen. If the moneys were not due the case is much stronger against them: see *Sykes's Case* (3).

For these reasons I am compelled to differ from the view taken by the learned Judge who decided this case. The appeal must be allowed, with costs, both here and below. The void payments having been made by cheques signed by both the directors, they are jointly and severally liable to repay both sums sought to be recovered by the liquidator, with interest at 4 per cent.

[His Lordship added that Lord Justice *Bowen* had read his judgment, and concurred in it.]

(1) 39 Ch. D. 266. (2) 12 Ch. D 755.
(3) Law Rep. 13 Eq 255.

KAY, L.J.:—

The first question is as to the meaning and effect of the 164th section of the *Companies Act*, 1862. It is argued that this section only makes that a fraudulent preference which would be so if the company were an individual who had since become bankrupt, and that in the case of such an individual any of his debtors who had a counter-claim against him which might be set off in an action may be relieved of such debt by a voluntary set-off by the bankrupt before bankruptcy. If this be so, it is by reason of the mutual credit clause, sect. 38 of the *Bankruptcy Act*, 1883. The effect of that clause is to give the debtor after the bankruptcy the advantage of set-off, and, therefore, to set off the debts before the bankruptcy cannot be in any sense fraudulent. But after a winding-up there is no such right of set-off, and, therefore, to allow a set-off before a winding-up does confer on the debtor an advantage which may be deemed fraudulent under sect. 164.

I am unable to read the section as this argument requires us to do. Its object is to prevent a fraudulent preference. If it has the meaning suggested, the case of a voluntary set-off must be an unintentional omission in the statute. But I do not think there is any such omission. I think sect. 164 should be read as meaning that any preference by way of set-off of a debtor who would have no right of set-off after the winding-up shall be treated as it would be treated in bankruptcy if he had no right of set-off after the bankruptcy, and if such a set-off would be a fraudulent preference in bankruptcy it shall be so in a winding-up.

The actual proceeding complained of is that two of the directors whose shares were not fully paid up, without any call being made for the unpaid amounts, paid these amounts to the banking account of the company, which was at the time in credit only for a trifling sum of about £2, and then, with the concurrence of some of the other directors, drew out the exact amounts so paid in, and retained them in respect of debts which the company owed to them for their directors' fees.

First of all, it is denied that this was a fraudulent preference, because it is said the company was solvent, or at all events the directors had good reason to believe that it was, and that this

C. A.
1893
In re WASHINGTON DIAMOND MINING COMPANY.
Kay, L.J.

was not done in contemplation of any danger of a winding-up order. It is extremely difficult to imagine why it was done at all if the intention was not to secure an advantage which these directors would not have in the case of a winding-up. In that event they must have paid up their shares in full and have proved their debts and taken only a dividend upon them. The transaction was not strictly a set-off. The money paid on the shares actually went to the bank account of the company. It became part of the company's assets divisible in the event of a winding-up among all the creditors *pro ratâ*. It was withdrawn to pay two creditors, and was undoubtedly to the extent of such payment a preference of those creditors. The company owed debts to the amount of £6368 14*s.* 2*d.* The uncalled capital amounted to £19,571 or thereabout. £900 of this has been recovered. On the evidence before us it seems extremely doubtful whether any more can be got in. It appears from a letter of the 15th of August, 1890, that there had been a petition for winding up presented which had been got rid of, and that letters threatened another if a very small debt were not paid. On the 17th of June, 1891, another petition was presented by a creditor. This claim was settled in the early part of July, 1891. Another creditor claiming more than £200 offered to take £100, and was informed by letter of the 24th of July that the company were unable to pay that amount. And on the 31st of July, 1891, one of the payments complained of was made, the other on the 1st of August. Moreover, the company had been incorporated on the 29th of June, 1889, but had never carried on any business, and would on this ground have been liable to be wound up on the petition of a shareholder.

It is impossible, therefore, to doubt that the transaction impeached was in contemplation of a possible and even probable winding-up, and was intended to obtain an advantage of which the winding-up would deprive these directors.

It has been pointed out that the *Bankruptcy Acts*, in adopting the law of fraudulent preference, have made some changes in it. As Lord *Cairns* said in *Butcher* v. *Stead* (1): "In place of raising an inquiry whether it was done in contemplation of bankruptcy,

(1) Law Rep. 7 H. L. 839, 846.

the Act provided certain definite tests, viz., that the bankrupt should have been at the time unable to pay his debts, as they became due, from his own moneys, and that he should become bankrupt within three months from the date of payment." Accordingly it has been held that if the circumstances mentioned in the Act are proved to exist, it is not essential to prove that there was a contemplation of bankruptcy: *Ex parte Griffith* (1); *Ex parte Hill* (2). But obviously, where those circumstances do exist, the case is stronger against the bankrupt when it is clear that the object, or one of the main objects, in making the payment impeached was to give an advantage of which the bankruptcy would deprive the person receiving such payment.

I am satisfied in this case that the company at the time of making these payments to the directors were unable to pay the debts they then owed out of their own money, and I doubt if they were able to pay them at all, and the winding-up commenced within three months after this transaction.

I am unable to resist the conclusion that these payments to the directors were a preference which by the terms of the statute should be deemed to be fraudulent. I think that all the directors who concurred in making the payments were guilty of a misfeasance, and that the order should direct them jointly and severally to repay the amounts, and also the costs of this application here and below.

Solicitors: *John M. Mitchell; Wrensted & Sharp; J. D. B. Lewis.*

(1) 23 Ch. D. 69. (2) 23 Ch. D. 695.

H. C. J.

C. A.
1893
June 14.

In re MILLARD'S SETTLED ESTATES.

[1893 M. 1091.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 26, *sub-s.* 2 (*iii.*)—*Capital Money—Improvements—Prospective Order.*

Tenants for life who desired to sell an estate in building lots submitted to the trustees a scheme, which the trustees approved, for laying out roads and sewers, at an estimated expense of £2100. The trustees had no capital moneys in hand. The tenants for life applied to the Court for an order authorizing the trustees to apply £2100 out of capital moneys to come to their hands for the construction of the roads and sewers:—

Held (affirming the decision of *Kekewich*, J.), that a prospective order of this kind could not be made, for that according to the true construction of the Act the payment by the trustees could only be sanctioned upon evidence that the work had been properly done, and what amount was properly payable by the trustees in respect thereof.

C. P. MILLARD devised his real estate, and bequeathed his residuary personal estate to trustees, in trust for sale and conversion. He directed them to invest the proceeds and hold them upon trusts, under which the testator's widow was tenant for life of one moiety, and his eight children were tenants for life in equal shares in the other moiety. The testator died in April, 1885.

Part of the testator's estate consisted of freehold properties at *Southall* and *Ealing*. In 1893 it was considered that parts of them could be advantageously sold for building purposes. The widow and her children, as tenants for life under the *Settled Land Acts*, submitted to the trustees of the will a scheme stating the intention of selling by auction in lots fourteen acres of the *Southall* property, and proposing that, with a view to such sale, certain roads shewn on a plan, with sewers under them, should be constructed, and that the expenses should be paid out of capital moneys arising under the Act. The estimated expense was £2100, which was intended to be met by the tenants for life and to be recouped by the trustees.

The tenants for life also submitted to the trustees a scheme stating the intention to sell twenty-two and a half acres of the

Ealing estate in two lots, lot 1 to be sold subject to a condition that the purchaser should make certain roads, specified on a plan, with sewers under them, and lot 2 subject to analogous conditions; and a condition was to be inserted that, if either lot was not sold, the vendors should be under the same obligations with respect to the roads and sewers on and under that lot as the purchaser would have been if it had been sold. The estimated expense of roads and sewers in lot 1 was £1400; in lot 2, £900. It was proposed that the expenditure devolving on the vendors should be paid out of capital moneys arising under the Act.

The schemes were approved by the trustees.

The tenants for life then took out an originating summons under the *Settled Land Acts* to obtain liberty for the trustees to apply the sums thereinafter mentioned out of the capital money arising under the Acts, or to come to their hands subject to the said settlement (that was to say)—(1.) £2100 for the construction of the above roads and sewers on the *Southall* estate. (2.) If lot 1 of the *Ealing* estate was sold and lot 2 was not sold at the auction, £900 for the roads and sewers on lot 2. (3.) If lot 2 was sold and lot 1 not sold at the auction, £1400 for the roads and sewers on lot 1.

The trustees had not in hand any capital moneys arising under the Acts.

The application was heard by Mr. Justice *Kekewich* in Chambers. His Lordship was of opinion that no payment for improvements ought to be sanctioned where the trustees had no capital moneys in hand, or immediately coming to their hands. His Lordship accordingly dismissed the application, and certified that he did not require further argument.

The tenants for life appealed.

Eve, for the appeal:—

It is of very great importance to the parties that an order of this kind should be made. The tenants for life, it is true, could sell a portion of the land by itself, and employ the money in making the roads and drains on the remainder; but such a sale would be very disadvantageous, for small lots of property will not sell well unless roads and drains are constructed. We are

C. A.
1893
In re MILLARD'S SETTLED ESTATES.

proceeding under the *Settled Land Act*, 1882, s. 26, sub-s. 2 (iii.). Sect. 16 of the Act shews that works of this kind were contemplated on the occasion of a sale for building purposes. Sect. 21, sub-sect. iii., authorizes the application of capital money in payment for improvements of this nature; and sect. 25, sub-sects. viii., xvii., xviii., shew most clearly that improvements of this kind are authorized. I submit that under sect. 26 the order may be made, though the trustees have not the money actually in their hands. The difficulty of Mr. Justice *Kekewich* was occasioned by this, that the section speaks of the capital money being in the hands of trustees; but this is only to distinguish the case from one where the money comes into Court. No rule is laid down by the Act to fetter the discretion of the Court as to making the order. In the case of *In re Hotchkin's Settled Estates* (1) a doubt was raised whether, after land had been sold, expenses incurred in improving it before the sale can be ordered to be paid out of the purchase-money. In the case of *In re Houghton Estate* (2), an order of the kind now asked was made; but the point whether it could be made prospectively does not appear to have been raised. *Round* v. *Turner* (3) makes against me so far as it goes; but it was not a decision under sect. 26.

C. Willoughby Williams, for the trustees.

LINDLEY, L.J.:—

I do not think it would be right for us to accede to this application. We are asked to grant now prospectively an authority empowering the trustees, who have no capital moneys in hand, to spend them in a certain manner when they have got them. The question is whether the Court has authority to do that under the provisions of the *Settled Land Act*, 1882.

Mr. *Eve* has said everything that he can say; but though his experience in these matters is very considerable, he is unable to bring to our notice any case in which such an order has been made except *In re Hotchkin's Settled Estates*, where the attention of the Court was not called to the point. The Registrar, who

(1) 35 Ch. D. 41. (2) 30 Ch. D. 102.
(3) W. N. (1889) 38.

has had great experience in drawing up orders, says he has never heard of such an order being made. Lord Justice *Kay*, who has had as great an experience as any Chancery Judge, informs us that he has never done it, and considers that there is no authority to do it. This, which appears to be the settled practice, appears to me more in conformity with the language of the Act than the declaration we are asked to make.

I will assume that the course which we are asked to sanction is a judicious one. There is land which is settled, the trustees have got no capital money, and they cannot get any except by selling land. The scheme is to sell this land in building lots, and for the purpose of doing that it is necessary of course to have some arrangement for setting out roads and sewers, and money is wanted for that purpose. What we are asked to do now is, before anything is done, to authorize the trustees when they get some money from the sale of the land to apply some £2100 in paying for roads and sewers. Have we any power to do that? Sect. 21 says, "Capital money arising under this Act" (and the proceeds of the sale of these lots would be capital money arising under the Act), "subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes," one mode being "in payment for any improvement authorized by this Act," and there is no doubt, I think, that the laying out roads and sewers is authorized by sect. 25. The section which we have to construe is sect. 26, which says: "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon"; and, "Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement on" a certificate of the Land

C. A.
1893
In re MILLARD'S SETTLED ESTATES
Lindley, L.J

Commissioners, or a like certificate of a competent engineer, or an order of the Court. Now, when we look at the certificates upon one of which alone the trustees would without an order of the Court be authorized to spend this money when they have received it, we see that neither certificate can possibly be prospective. The certificate, whether in the case of the Land Commissioners or of the engineer, must be that the work or operation has been properly executed, and what amount is properly payable by the trustees in respect of it. Neither the Land Commissioners nor the engineer are to act prospectively and to certify that it would be a good thing to do certain works, and that it would be a good thing to spend such a sum upon them, but that certain work which is authorized by the Act has been properly done, and that a certain sum of money is properly payable by the trustees in respect of it. I ask myself this. The tenant for life has three courses—he may get a certificate from the Land Commissioners or a certificate from the engineer, or he may apply to the Court. Clause iii. says, "An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money." Now, upon what sort of evidence ought the Court to make such an order? It strikes me that the Court ought to be guided by the other alternatives, and I do not see how it would be safer for the Court to make a prospective order than it would be for the Land Commissioners or the competent engineer. If they cannot do it, that strikes me as an indication that it never was intended that the Court should do it. What is wanted is protection—that is, protection for those interested in the land; and as practical men we know that to authorize a thing to be done is a very different thing from approving it when it has been done. The amount of protection is very great in the latter case, and is comparatively small in the former.

Now, I cannot find in the Act anything which authorizes the Court to make prospective orders of this kind, nor anything which looks as if the Legislature ever contemplated the Court doing so. There are no negative words to say the Court cannot, and I am reluctant to place fetters upon the power of the Court; but when I address my mind to the scheme of the Act, it seems

that we should be departing from it rather than conforming to it if we did what is asked. The application must be refused.

LOPES, L.J.:—

I am of the same opinion. It is admitted here that there is no capital money in the hands of the trustees applicable to this particular purpose; but we are asked to make an order in anticipation with regard to money not now in the hands of the trustees when it comes to their hands. In my opinion we have no jurisdiction to make such an order. It seems to me that to hold otherwise would be violating the words of the Act. Sect. 21 says: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one . . . of the following modes." Those words "when received" seem to me to be very strong. Then, when we look at sect. 26, sub-sect. 2, it says: "Where the capital money to be expended is in the hands of trustees." I think the words used in both those sections point to this, that the money at the time that the order is made is to be in the hands of the trustees. Then again it seems to me that under sub-sect. 2 (i.), (ii.), (iii.), it is almost a condition precedent that the work should have been properly executed, and that it should appear what amount is properly payable. How can you tell whether the work is properly executed or what amount is properly payable, if an order is made in anticipation? I think that there is no jurisdiction to make such a prospective order as has been asked for in this case. Lord Justice *Kay*, in *Round* v. *Turner* (1), said very much the same thing as we are saying to-day.

A. L. SMITH, L.J.:—

I agree, and I have nothing to add.

Solicitors: *Gush, Phillips, Walters, & Williams.*

(1) W. N. (1889) 38.

H. C. J.

C. A.
1893
NORTH, J.
May 18.
C. A.
June 28

MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY *v.* NORDENFELT.

[1891 M. 779.]

Practice—Inquiry as to Damages—Particulars of Plaintiffs' Claim.

An inquiry as to damages sustained by the Plaintiffs by reason of the Defendant's breach of his covenant in restraint of trade having been directed, and an order for an affidavit of documents by Defendant having been made:—

Held, by *North*, J., that the Plaintiffs must give a statement in writing of the heads under which they sought to recover damages from the Defendant, and that the time for the affidavit of documents must be extended till fourteen days after the Plaintiffs' statement:

Held, on appeal, that, as the Plaintiffs were ignorant of the particulars of breaches of covenant, the order would be useless, as they could only comply with it by stating every imaginable ground of damage, and the order was therefore discharged.

THIS action was brought to restrain the Defendant from breaking a covenant in restraint of trade into which he had entered with the Plaintiffs, and for damages in respect of breaches of the covenant which he had already committed.

The Court of Appeal (1), reversing a decision of Mr. Justice *Romer*, had held that the Plaintiffs were entitled to an injunction restricted to certain specified businesses, and directed an inquiry to assess the damages sustained by the Plaintiffs by reason of the breach by the Defendant of his covenant as thus restricted.

On the 24th of February, 1893, an order was made in Chambers that the Defendant should make an affidavit as to the documents in his possession relating to the matters in question in the inquiry directed by the order of the Court of Appeal.

The time for filing it was repeatedly extended, and, ultimately, on the 17th of April, the Defendant took out a summons on which Mr. Justice *North* in Chambers, on the 24th of April, 1893, made an order which directed "that the Plaintiffs do within two months after service of the order deliver particulars in

(1) [1893] 1 Ch. 630.

writing of the damages alleged to have been sustained by the Plaintiffs by reason of the alleged breach of the covenant contained" in the agreement between the Plaintiffs and the Defendant, and that the time for the Defendant to file a further affidavit of documents pursuant to the order of the 24th of February be extended until fourteen days after the delivery of such particulars.

The Plaintiffs moved before Mr. Justice *North* on the 18th of May, 1893, to discharge or vary the order made in Chambers.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the Plaintiffs:—

The order of the 24th of February has not been appealed from, and it is now too late to appeal from it. It is for the Defendant to pledge his oath as to the documents in his possession relating to the inquiry. The Plaintiffs cannot give any particulars which will assist the Defendant; he has the information, and the Plaintiffs have not.

E. Beaumont, for the Defendant.

NORTH, J.:—

I think the order which I made is substantially right, but as drawn up it is not so clearly expressed as to describe what was really intended. It might be taken to mean that particulars with dates and figures are to be given by the Plaintiffs. That is not what was said by me, or what was understood by either of the parties to the discussion before me in Chambers. I thought then, and I still think, that the Defendant is entitled to have some statement shewing under what heads damages are claimed against him by the Plaintiffs, in order that he in his turn may be able to look up the documents relating to those several heads and to deal with them accordingly. It was said that the effect of requiring such a statement would be to shut out the Plaintiffs from giving particulars of any damages but those which fall under the heads mentioned in the statement. I do not think that would be the effect of the statement. If it should turn out in the course of investigation properly made that any other head of damage had been omitted or lost sight of, the

C. A
1893
MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v NORDENFELT
North, J.

Plaintiffs might apply at once to have it added, and this would be done. The object of requiring the statement is not to limit the Plaintiffs' claim, but to compel them to state in some way what are the points to which the Defendant is to address his mind in answering the question what documents relating to them are in his possession or power. At present he is asked to answer this question in the dark. The Plaintiffs say that they also are asked to make a statement in the dark. I appreciate what they mean; but they entirely overlook the fact that the Defendant is exactly in the same position, for he can have no idea what are all the heads under which the Plaintiffs will claim damages against him, and it is impossible for him, therefore, to make the required affidavit of documents. I think it is right that in such a case the Plaintiffs should give the Defendant a statement—I will call it a statement, in order to prevent its being said that any of the rules as to particulars is to govern the case—a statement in writing shewing the various heads under which they seek to recover damages from the Defendant, and to prevent any such question as has been suggested arising, I will add liberty for the Plaintiffs, with the leave of the Judge in Chambers, to make further statements from time to time. Mr. *Hardy* admitted that the Plaintiffs desired to have an opportunity of ransacking all the books and papers of the Defendant in order to find out what damages they have suffered from the Defendant's acts. I think that is an outrageous claim, and the Defendant is not bound to submit to it. I will discharge the order which has been made, and substitute for it an order to the effect which I have mentioned, so as to avoid any difficulty which might arise from the use of the technical word "particulars." The costs of this application will be costs in the action subsequent to the judgment of the Court of Appeal.

W. L. C.

C. A

The Plaintiffs appealed. The appeal was heard on the 28th of June, 1893.

Cozens-Hardy, Q.C., and *W. F. Hamilton*, for the Appellants:—

It is impossible for us to comply with this order in any useful way until we have got discovery of documents. The materials

for answering the inquiry are in the Defendant's possession; we do not know what orders he has been executing, or what are the particulars of his breaches of covenant. If this order stands, all that the Plaintiffs can do, and what they must do, is to deliver a statement of heads of claim comprising every head of claim which the ingenuity of their pleader can think of. There is no precedent for such an order as this. The Plaintiffs are entitled to the discovery they ask: *Hanslip* v. *Kitton* (1), and the order of the 24th of February, which has not been appealed from, ought to be obeyed.

E. Beaumont, for the Defendant:—

The inquiry is vague and general, and the Defendant ought to be informed of the nature of the case he has to meet. He had long ago, before the order of the Court of Appeal, filed a voluminous affidavit of documents, and the present proceedings are oppressive. The Plaintiffs wish to go through the Defendant's books from beginning to end.

Hamilton, in reply:—

An order like the present is quite unprecedented. In prosecuting the inquiry the Plaintiffs are entitled to have the fullest discovery from the Defendant: *Murray* v. *Clayton* (2).

LINDLEY, L.J.:—

This is an appeal from an order in an unusual form, and made under unusual circumstances. The action was brought upon a covenant not to engage in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition. The case has already been before the Court of Appeal, but only on a pure question of law, and the Court knew nothing whatever about the facts. The Defendant admitted a breach of the covenant, but the kind of breach was not disclosed. He contended for the right to do that which he had undertaken not to do, his argument being that the covenant was one which could not be enforced.

In that state of things the Court of Appeal had to consider the

(1) 1 D. J. & S. 440. (2) Law Rep. 15 Eq. 115, 118.

C. A.
1893
MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT
Lindley, L J

legal point raised by the Defendant. The Court decided that point against him, and granted an injunction to restrain him from infringing the covenant, and directed an inquiry what damages the Plaintiffs had sustained by reason of the breach of such covenant. In prosecuting that inquiry, or with a view to prosecute that inquiry, the following steps have been taken. On the 24th of February the Plaintiffs obtained an order that the Defendant should, within twenty-one days after service, make the usual affidavit of documents relating to the matters in question, not of course in the action, but in the inquiry as to damages directed by the order to which I have referred. The Defendant did not make any affidavit in pursuance of the order, but he took out a summons, "That the Plaintiffs may be directed to deliver to the Defendant particulars in writing of the damages alleged to have been sustained by the Plaintiffs by reason of the alleged breach of covenant, and that in the meantime the time limited for the Defendant to file a further affidavit of documents, under the order of the 24th of February, may be extended until ten days after the delivery of such particulars." Upon that the Judge in Chambers made an order of the 24th of April; but on the 18th of May he discharged it in Court, and made the following order: "That the Plaintiffs do on or before the 18th of July deliver to the Defendant a statement in writing shewing the various heads of claim for damages alleged to have been sustained by the Plaintiffs by reason of the breaches of the covenant contained in the second clause of the agreement of the 12th of September, in the order of the Court of Appeal referred to;" and then it is ordered, "That the Plaintiffs be at liberty, with the leave of the Judge, to deliver any further statement to the Defendant." And then it is ordered that the time for the Defendant to file a further affidavit of documents be extended until fourteen days after the delivery of such first-mentioned statement. Therefore, the Plaintiffs are under this order not bound to give particulars of damages, but they are bound to give a statement in writing shewing the various heads of claim.

It is obvious that Mr. Justice *North* made this order in the hope and in the expectation of preventing an abuse of the power

of discovery; and if I thought that the order would have that effect, I certainly should not dissent from it. But it is appealed from by the Plaintiffs, who say, "We cannot, until we get discovery of documents, give the heads of our claim, except by drawing upon our imagination, and putting into our statement every head of claim we can think of; and we cannot limit it, because we are in ignorance of the facts." If that is true, this order will not have the effect intended by the learned Judge, and I am afraid it is true. I do not see how any professional man could, in justice to his client, make a statement in writing shewing the various heads of claim without enumerating every head of claim which he could think of; and if so, the statement would not afford any protection at all to the Defendant; he would be no better off with such a statement in writing than he is now. On the other hand, it must not be supposed that the Plaintiffs will be at liberty to ransack the Defendant's books and papers from end to end. That will depend on the affidavit the Defendant makes. He ought to make a careful affidavit, limiting the documents which he admits to be in his possession to those which relate to this matter, putting his own construction on the covenant, if need be. That may lead to further litigation; but I cannot see that there is any real answer to the Plaintiffs' contention that they cannot usefully comply with this order until they have seen the books. Until then, they can only comply with it in the letter, and not in the spirit. The order must be discharged, and the costs will be the Plaintiffs' costs in any event.

LOPES, L.J.:—

I am of the same opinion. An inquiry here was ordered to assess the damages sustained by the Plaintiff company by reason of a breach by the Defendant of his covenant, as restricted by the order made by this Court when the question with regard to the validity of the covenant was before us. The matter came before Mr. Justice *North*, and he made two orders. I need not refer to the first, which was for particulars. Then it came before him again; and he says, referring to the first order, that he did not by that order intend particulars in the technical sense of the

C. A.
1893
MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY v. NORDENFELT
Lopes L.J.

word, but that he thought the Defendant was entitled to a statement in writing of the heads of damage claimed by the Plaintiffs, so that he might be able to address his mind to the points with which he had to deal. That was the order made by Mr. Justice *North*, and that is the order which is now appealed against.

The Plaintiffs complain of that order, and say: "We cannot in substance comply with this order until we get discovery; if we complied with it, we should have to deliver a statement of heads of damage, including every head of damage that we could think of." If that is so, it seems to me that the order would do the Defendant no good, and for many reasons it would be very undesirable.

Now, is what the Plaintiffs say true? It seems to me that it is true, for I cannot understand how the Plaintiffs can know what the Defendant has been doing. It is done entirely behind their backs. They cannot know what orders have been given, or in what particular way the Defendant has caused them damage.

It seems therefore, to my mind, that the right thing is that this order should be discharged, and that the Defendant should make an affidavit of documents, and give discovery. It is suggested that what is desired is to ransack the whole of the Defendant's books. It seems to me that the affidavit may be so prepared that any such ransacking may be effectually prevented. All that the Defendant is to disclose would be that which is relevant to the matters in issue in the inquiry; and, so far as his books are not relevant, he would not be compelled to disclose them; he can seal up everything which he swears not to relate to the matters in the inquiry. I agree that the order would not have the result which the learned Judge had in view when he made it, and that it must be discharged, the costs to be the Plaintiffs' costs in any event.

A. L. SMITH, L.J.:—

I am very loth to differ from my Brother *North* in this case, because I have not the slightest doubt that he made this order for the purpose, if possible, of preventing a vexatious and oppressive use of the procedure by way of discovery, and if I thought that this order, which undoubtedly, as has been pointed out,

is a novel one, and may be unique, would bring about what that learned Judge desired to bring about, I certainly should not have differed from him. But, after the argument, I have arrived at the conclusion that what the learned Judge had in view will not be carried out by this order. He has said that, before the Defendant gives discovery, the Plaintiffs are to give a statement in writing shewing the various heads of claim under which they seek to recover damages. Now, what will the Plaintiffs do? It has been frankly said by their learned counsel that they will state every conceivable head under which a claim for damages can be made, that is, they will state in particularity everything they can think of which is contained in the general words "by reason of the breach of covenant." There is no possibility of limiting the Plaintiffs to what in the end will turn out to be the real heads under which they are going, and under this order a set of heads of claim would be given which would be no help at all to the Defendant. It appears to me that this order, which cannot bring about any good result, ought not to be sustained. It is for this reason, and for this reason only, that I disagree with my Brother *North*. I entirely agree with what has fallen from Lord Justice *Lindley* and my Brother *Lopes*, namely, that the Defendant must put his construction upon the covenant, and then make an affidavit of documents.

Solicitors for Plaintiffs: *Wilson, Bristows, & Carpmael.*
Solicitors for Defendant: *Munns & Longden.*

H C J.

C. A.
1893
WRIGHT, J.
March 7.

C. A.
June 27, July 3

BROCKLESBY *v.* TEMPERANCE PERMANENT BUILDING SOCIETY.

[1892 B. 2959.]

Principal and Agent—Excess of Authority—Liability of Principal—Mortgage—Authority to pledge Title-deeds for a particular Sum—Forged Deeds—Redemption.

The owner of land deposited the title-deeds with the *U. Bank* to secure an advance of £750. Being desirous of obtaining a further advance of £1500, he authorized his son to borrow £2200 from another bank and gave him a written authority to receive the deeds from the *U. Bank* on payment of the sum due to them. The son fraudulently pledged the deeds to a different bank from that which had been proposed for a much larger advance than he was authorized to borrow, forging his father's name to a promissory note and deposit note. Out of this advance he paid £750 to the *U. Bank*, and £1500 to his father, and kept the rest for his own use. The son afterwards induced the Defendants to advance him a still larger sum, out of which the advance by the bank was paid off, and the land was conveyed to the Defendants by forged deeds by way of mortgage for securing the advances. The Defendants had no notice of the fraud, and the dealings with the property were kept secret from the father. Subsequently the son absconded, and the facts then became known to the father. He brought an action against the Defendants claiming to redeem the property on payment of the sum of £2200 which he had authorized his son to borrow:—

Held (affirming the decision of *Wright*, J.), that the Plaintiff, having placed the deeds in the control of his son, could not redeem the property without paying the whole amount which his son had raised upon them; although the son had exceeded his authority in raising more than he was instructed to raise, and had effected his purpose by forgery.

THE Plaintiff, a solicitor, employed his son as managing clerk from 1881 to 1890; he then admitted him into partnership, and the father and son carried on business as partners until May 1892, when the son absconded.

On the 26th of June, 1884, the Plaintiff advanced to *Joseph Corke* £4800 on the security of a mortgage of certain freehold property in *Wimbledon*.

In October, 1884, the Plaintiff borrowed £3000 from his bankers, the *Union Bank*, and deposited with them as security for the loan (1.) the mortgage and title-deeds relating to the

Wimbledon property, and (2.) the title-deeds relating to a leasehold house, No. 458, *Camden Road*, belonging to the Plaintiff.

The Plaintiff gradually paid off this loan, and in May, 1891, the sum remaining due from him was only £767 11*s.* 9*d.*

At this date the Plaintiff required a further advance of £1500. His son advised him that he could obtain the money on more favourable terms from Messrs. *Ashby & Co.* (the son's bankers), and suggested that the deeds deposited with the *Union Bank* should be transferred to *Ashby & Co.* upon their paying off the *Union Bank* and making the further advance of £1500. The Plaintiff assented, and on the 30th of May he gave to his son an authority addressed to the manager of the *Union Bank* in the following terms: "Please permit the bearer to see my securities." On the 3rd of June the Plaintiff gave to his son a further authority, addressed as before, to the following effect: "Please hand to bearer of this (on payment of the balance of my loan and interest) the deeds deposited by me with you as security for the loan." This authority was in the son's handwriting, but it was signed by the father. On the 4th of June the Plaintiff, without receiving back from his son the authority of the previous day, gave him a third authority addressed to the manager of the *Union Bank*, which was in the following terms: "Please give bearer (*Ashby's Hampton Court Bank*) inspection of my deeds, and on their paying the amount due thereon hand the securities over to them, they having arranged to advance me a further sum of £1500 which I require by the 1st of July next."

The son, instead of going to *Ashby & Co.*, as he had suggested, applied to the *London and South Western Bank*, and arranged with them for a loan of £3500 on the security of these deeds. In order to obtain the deeds, he went on the 9th of June to the *Union Bank*, accompanied by a clerk of the *London and South Western Bank*, and produced the authority of the 3rd of June without disclosing the later authority. The bank thereupon accepted payment of the amount of their debt, and handed over the deeds to the son, who deposited them with the *London and South Western Bank* as security for the balance of the £3500.

He also handed to the *London and South Western Bank*, as an additional security for the loan, a memorandum of deposit and a

C. A.
1893
BROCKLESBY
v.
TEMPERANCE
PERMANENT
BUILDING
SOCIETY

promissory note purporting to be signed by the Plaintiff; but the Plaintiff's signature to both instruments was in fact forged by the son. He then paid the £1500 to the Plaintiff, and appropriated the balance to his own use. The Plaintiff believed that this advance had been made by Messrs. *Ashby & Co.*, and had no knowledge of his son's dealings with the *London and South Western Bank.*

Towards the end of 1891 the bank began to press for repayment of the £3500, and it became necessary for the son to obtain an advance from some other source. Accordingly, he prepared a deed purporting to be a transfer of the mortgage of the 26th of June, 1884, from the Plaintiff to himself, and forged the Plaintiff's signature to it. He also prepared an indenture purporting to be made between *Corke* and himself, whereby *Corke*, in consideration of the sum of £100, purported to convey to him the equity of redemption, and he obtained *Corke's* signature to this deed. *Corke* was an illiterate man, and he did not in fact receive any consideration for the conveyance. In this manner the son was enabled to represent himself as the absolute owner of the *Wimbledon* property. He then entered into negotiations with the *Nineteenth Century Building Society* and the *Temperance Permanent Building Society* for an advance sufficient to pay off the £3500 and interest, and it was ultimately arranged that the former society should advance £600 on the security of the house in *Camden Road*, and that the latter should advance £3000 on the security of the *Wimbledon* property.

On the 15th of January, 1892, the son handed to the *Nineteenth Century Society* an indenture of that date, purporting to be made between the Plaintiff and the society, whereby the Plaintiff purported to mortgage the house in *Camden Road* to the society to secure the £600; but the Plaintiff's signature was again forged by the son. On the same day the society paid the £600 to the *London and South Western Bank*, and the title-deeds relating to the house were handed over to them.

On the 22nd of January, 1892, the son purported to convey the *Wimbledon* property by way of mortgage to the *Temperance Society* to secure the £3000, and the society then paid that amount to the *London and South Western Bank*, and they re-

ceived from them the mortgage of the 26th of June, 1884, and the other title-deeds relating to that property. The Plaintiff did not become aware of these transactions until some time later. After some negotiations, he brought this action against the two building societies and *Corke* for a declaration that the Defendant societies were only entitled to hold their securities for the sum of £2267 11*s.* 9*d.* (the amount by which the Plaintiff had benefited), with interest thereon, and for redemption of the securities on these terms, and delivery of the title-deeds.

The action was heard before Mr. Justice *Wright* on the 7th of March, 1893.

Lawson Walton, Q.C., and *Woodfin*, for the Plaintiff:—

The Defendants have no title to the deeds, as they can only claim them through forged instruments, and the Plaintiff is entitled to redelivery on payment of the sum which he authorized his son to raise.

Murphy, Q.C., and *Osler*, for the *Temperance Permanent Building Society*; and

Cozens-Hardy, Q.C., and *G. A. Watson*, for the *Nineteenth Century Building Society*:—

The Defendants have an equitable charge upon the deeds apart from the forged instruments. The false security does not merge the real security, and the Defendants are therefore entitled to sit upon the deeds. Where a man entrusts the possession of deeds to an agent for the purpose of raising money upon them, and the agent has taken advantage of such possession to raise a larger sum than was authorized, he cannot recover possession against an innocent incumbrancer: *Perry-Herrick* v. *Attwood* (1); *Briggs* v. *Jones* (2); *Northern Counties of England Fire Insurance Company* v. *Whipp* (3).

Corke did not appear.

Lawson Walton, in reply.

(1) 2 De G. & J. 21. (2) Law Rep. 10 Eq. 92.
(3) 26 Ch. D. 482.

C. A.
1893
BROCKLESBY v. TEMPERANCE PERMANENT BUILDING SOCIETY.

WRIGHT, J.:—

In this case I think the Plaintiff's claim in substance fails, although I think that he is entitled to be relieved from every kind of imputation on his character in this matter. I think there is no evidence on which I can be properly asked to say that Mr. *Brocklesby*, the father, had any suspicion with regard to his son; but that is not enough to enable him to succeed in this action. Mr *Brocklesby* has satisfied me that, having given a blank authority for his son to hand to the *Union Bank* to deliver the deeds to anybody, he afterwards gave to his son a limited authority to the *Union Bank* to deliver the deeds to *Ashby & Co.*; but I am afraid that in delivering that blank authority to his son and not taking care to get it back before he gave his son the limited authority, he put his son in a position which enabled him to carry out a series of frauds, and that that gives to all innocent incumbrancers, such as the Defendants are, without notice or without anything to put them upon inquiry, a right to sit upon whatever they have got. Then I am rather inclined to say that in finding the innocence of the Plaintiff as I do, I can only find it on the ground of imputing to him an amazing amount of carelessness and simplicity and negligence of the most ordinary precautions of life, which shew that he cannot complain if any of the parties, such as the Defendants here are, took his securities in reliance upon the way in which the son chose to deal with them. I cannot conceive any man of business acting as Mr. *Brocklesby* did, because, if he had been in the least awake upon matters of business, he must have been put on inquiry as to what his son was doing, and the least inquiry at any moment would have brought down the whole fabric of cards. Mr. *Brocklesby* unfortunately trusted his son with a document which enabled him to get possession of these deeds, and he trusted the son to raise money upon them, and, having done that as against innocent incumbrancers who have acted in the belief of the son's authority, he cannot complain if larger amounts have been advanced than he intended. Then I was puzzled for a time upon the point of whether the bankers were justified in relying upon what was a merely equitable mortgage by way of deposit when the documents themselves shewed that the person

getting the money was not the person entitled to get it; but I think Mr. *Hardy* has given the answer to that, namely, that the Defendants believed and were justified in believing that they were advancing money to the proper person, whose name appeared upon the documents, namely, the father, and that they were misled into that belief by reason of a chain of circumstances and events which followed naturally from the first error of Mr. *Brocklesby* in trusting his son with a blank authority. If you authorize an agent to get possession of documents for the purpose of raising money upon them, I do not think it matters either in common sense or in law whether they remain in the first hands into which they get, or whether they pass in the ordinary course of business into second, third, or fourth hands. Of course, if the Defendants had really been advancing money to the son, who was not on the genuine documents the legal owner, and they had advanced the money in reliance on a title made by him by forging them, I should have said that Mr. *Brocklesby* was not in any way bound by that forgery. But that is not the position of either of the Defendants. There will be a declaration that the *Temperance Permanent Building Society* are entitled to an equitable charge on the mortgage of the 26th of June, 1884, and the title-deeds relating to the *Wimbledon* property, and that the *Nineteenth Century Building Society* are entitled to a like charge on the deeds relating to the house in *Camden Road* for £3000 and £600 respectively, with interest thereon.

H. B. H.

C. A.

From this judgment the Plaintiff appealed. The appeal was heard on the 27th of June, 1893.

Lawson Walton, Q.C., and *Woodfin*, for the Appellant:—

The authority given to the Plaintiff's son by the document of the 3rd of June was revoked and cancelled by the document of the 4th of June, which was an authority to *Ashby & Co.* to receive the deeds. But whatever authority the Plaintiff's son had, it only extended to raising £2200. His conduct in raising the additional amount was not a mere excess of his authority, but

C. A.
1893
BROCKLESBY v. TEMPERANCE PERMANENT BUILDING SOCIETY.

was effected by a criminal act, namely, the forgery of his father's name. The Defendants in advancing the money did not trust to the authority of the son, but to the forged deeds, which they supposed to be the deeds of the Plaintiff; and it is well established that a forged security can have no efficacy against the true owner of the property. The fact of the son having acted in excess of his authority was only one step in a course of fraud; and the act of the Plaintiff in giving him the control of the deeds was not the proximate cause of the advance of the money by the Defendants. Therefore, no question of estoppel on that ground can arise. Nor was there any negligence on the part of the Plaintiff in trusting his son, who was also his partner: *Swan* v. *North British Australasian Company* (1); *Merchants of the Staple of England* v. *Bank of England* (2); *Baxendale* v. *Bennett* (3); *Arnold* v. *Cheque Bank* (4); *In re Cooper* (5).

[LOPES, L.J., referred to *Johnston* v. *Renton* (6).]

Cozens-Hardy, Q.C., and *G. A. Watson*, for the *Nineteenth Century Building Society*:—

The authority of the 3rd of June was not revoked by the document of the 4th of June; they were both left in the hands of the Plaintiff's son, and the son had full authority from his father to take the deeds and to raise £2200 on them. If he exceeded his authority it was the direct fault of his father, who allowed him to have possession of the deeds. It has been well settled that a man who entrusts his deeds to another with authority to pledge them for a particular sum cannot complain if he pledges them for a larger sum to a stranger who has no notice of the limit to the authority: *Perry-Herrick* v. *Attwood* (7); *Barwick* v. *English Joint Stock Bank* (8); *Northern Counties of England Fire Insurance Company* v. *Whipp* (9); *Swire* v. *Francis* (10). The forgeries were only incidents in the fraud. The Defendants trusted in the authority which had been origi-

(1) 2 H. & C. 175, 181.
(2) 21 Q. B. D. 160.
(3) 3 Q. B. D. 525.
(4) 1 C. P. D. 578.
(5) 20 Ch. D. 611.
(6) Law Rep. 9 Eq. 181.
(7) 25 Beav. 205; 2 De G. & J. 21.
(8) Law Rep. 2 Ex. 259.
(9) 26 Ch. D. 482.
(10) 3 App. Cas. 106.

nally given to the Plaintiff's son to raise money on the deeds; and those deeds, being deposited with them on the faith of that authority, cannot be taken from them without payment of the amount which they have advanced.

Crackanthorpe, Q.C., and *Osler*, for the *Temperance Permanent Building Society*.

Lawson Walton, in reply.

1893. July 3. LINDLEY, L.J.:—

This is an appeal by the Plaintiff from a judgment of Mr. Justice *Wright* declaring certain documents forgeries, and declaring the Plaintiff entitled to redeem certain title-deeds mentioned in the order, on payment of £3000 and interest to the *Temperance Building Society*, and on payment of £600 and interest to the *Nineteenth Century Building Society*. The Plaintiff's contention is, that he is entitled to redeem the deeds on payment of a much less sum. His counsel did not seriously contend that he was entitled to recover the deeds without paying anything. The history of the controversy which has arisen is very painful, and the facts are complicated. Several deeds and documents under which the Defendants claim to hold the deeds in question were undoubtedly forged by the Plaintiff's son, who was also his partner. The forgeries were proved before Mr. Justice *Wright*, and the correctness of his judgment, declaring the documents impeached by the Plaintiff to be forgeries, has not been questioned upon the appeal. It is unnecessary to consider what the Defendants' rights would be if their claim to hold the deeds depended only on the forged documents. The cases cited by the Plaintiff's counsel go far to shew that in the case supposed the Plaintiff would be entitled to recover the deeds without making any payment at all, and that his alleged negligence in letting his son obtain the deeds would not estop the Plaintiff from recovering the deeds from the Defendants. I rather think that this would be so, and I will assume it to be so. But the Defendants base their right to retain the deeds as security for the sums they have advanced on them on other grounds

C. A.
1893
BROCKLEBBY
v.
TEMPERANCE
PERMANENT
BUILDING
SOCIETY.
Lindley, L.J.

altogether. To make these intelligible a short statement of the facts on which they rely is necessary. In May, 1891, the deeds in question were held by the *Union Bank* as a security for £750, the unpaid balance of a larger sum which had been advanced to the Plaintiff by that bank. The Plaintiff wanted to raise another £1500 on the same deeds. His son persuaded him that he could raise money on the deeds from his (the son's) own bankers, Messrs. *Ashby & Co.*, on easier terms than the Plaintiff could from the *Union Bank*. The Plaintiff consented to this being done, and he signed and gave to his son two documents, dated respectively the 30th of May, 1891, and the 3rd of June, 1891, addressed to the manager of the *Union Bank of London, Chancery Lane*, which were respectively as follows: "Please permit the bearer to see my securities." "Please hand to bearer of this (on payment of the balance of my loan and interest) the deeds deposited by me with you as security for the loan." On the next day, the 4th of June, the father signed and gave to the son another document (addressed to the same manager), which was as follows: "Please give bearer (*Ashby's Hampton Court Bank*) inspection of my deeds, and, on their paying the amount due thereon, hand the securities over to them, they having arranged to advance me a further sum of £1500, which I require by the 1st July next." Having got these documents, the son went to the *London and South Western Bank*, and induced that bank to agree to advance £3500 on the deeds. A clerk of the *London and South Western Bank* went with the son to the *Union Bank*, and paid that bank off. The deeds were then handed to the son; and he obtained from the *London and South Western Bank* the balance of the £3500 on the security of the deeds, and of a forged memorandum of deposit and promissory note. The son handed to the Plaintiff £1500, and kept the balance himself. The Defendants have paid off the *London and South Western Bank*, and claim to stand in its place for the sum of £3600, which was the amount paid by them to that bank for principal and interest. The *Nineteenth Century Society* paid off £600, and got some of the deeds. The *Temperance Building Society* paid off £3000, and got the remaining deeds. There were several other forged deeds and documents, which I purposely pass over in order to reduce the

Defendants' contention to its simplest form, and to place it in the clearest light. The right of the Defendants to stand in the place of the *London and South Western Bank* cannot be seriously disputed. They have paid that bank off, and have got the securities it held. It becomes necessary, therefore, to consider on what terms the Plaintiff could have obtained his deeds from that bank. To the extent of £750, which the *London and South Western Bank* paid to the *Union Bank*, the *London and South Western Bank* would be entitled to stand in the place of the *Union Bank*, and the Plaintiff clearly cannot recover the deeds without paying this sum at least. Further, as the son had the Plaintiff's authority to borrow for the Plaintiff £1500 on these same deeds, and he did borrow that sum for the Plaintiff on them from the *London and South Western Bank*, and the Plaintiff got this money, it is plain that he cannot recover the deeds without paying this sum of £1500 also. It is true that the Plaintiff knew nothing of the *London and South Western Bank*, and believed that the son had got the £1500 from Messrs. *Ashby & Co.*; but this departure by the son from the authority given him will not entitle the Plaintiff to repudiate the loan of £1500 on the deeds, and to get them back without repaying the £1500 borrowed upon them for him, and which he has in fact received. So far there is really no difficulty in the case, and the Plaintiff's statement of claim is based on this view of his rights; for he asks for a declaration that he is entitled to redeem the deeds on paying £2250 (*i.e.*, £1500 and £750) and interest. The real difficulty is as to the Plaintiff's right to redeem without paying the further sum of £1250, being the balance of the £3500 obtained by the son from the *London and South Western Bank*, and which balance the son had no authority to raise, and which he put into his own pocket. In order to decide this question it is necessary to consider the effect of the documents signed by the Plaintiff on the 3rd and 4th of June, and the real, as well as the apparent, authority given by him to his son. The document of the 3rd of June placed the deeds under the control of the son, provided he paid off the *Union Bank*, and it was signed by the Plaintiff, and was given by him to his son in order to enable the son to pay off the *Union Bank*, and to borrow another £1500 on the deeds for the

C. A.
1893
BROCKLESBY
v
TEMPERANCE
PERMANENT
BUILDING
SOCIETY
Lindley, L J.

Plaintiff. This was the document which the son produced and acted on, and on which the *Union Bank* and the *London and South Western Bank* both acted, when the *Union Bank* was paid off, and the *London and South Western Bank* took over the deeds. The document of the 4th of June was given to the son, but was never shewn by him to any one. The Plaintiff says it revoked the authority previously given by him to his son. I cannot adopt this view. I am satisfied by the Plaintiff's own evidence that this document was given to the son the better to enable him to obtain a further advance from *Ashby & Co.*, and that the son's authority to pledge the deeds for an additional advance for £1500 to the Plaintiff never was revoked in fact. I do not understand from Mr. Justice *Wright's* judgment that he took a different view of the evidence on this point. There was a great contest before him about this document of the 4th of June; but in the result the learned Judge believed the Plaintiff's statement that he had in fact signed it, and had given it to his son to shew to *Ashby & Co.* But what for? Not to substitute *Ashby & Co.*, of whom the Plaintiff knew nothing, for his son; not to discredit him in their eyes and to revoke his authority; but, on the contrary, to satisfy them that he was acting for his father (the Plaintiff), which is what the Plaintiff believed to be true. The letter of the 4th of June was not addressed to *Ashby & Co.*, but was given to the son to be used by him; and he never used it at all. The first authority, that given by the letter of the 3rd of June, was never recalled or cancelled, nor was the son's authority to raise £1500 on the deeds ever recalled or cancelled; and the case must be decided on this footing.

The question for decision, thus reduced to its simplest form, may be thus stated: Suppose an owner of deeds has placed them under the control of another, and has authorized him to pledge them for a certain sum, and suppose that he has pledged them for more with a person dealing with him *bonâ fide* and without notice of the limit of his authority, can the owner of those deeds redeem them without paying the full amount advanced upon them? The answer to this question is, No. The point was settled many years ago in *Perry-Herrick* v. *Attwood* (1),

(1) 25 Beav. 205; 2 De G. & J. 21.

and *Briggs* v. *Jones* (1). These cases do not turn on fraud or negligence. They are based on the principle that a legal owner of deeds who entrusts them, or the control of them, to an agent, in order that he may raise money on them, cannot, in equity, at all events, recover them from a person who has *boná fide* advanced money on them, without notice of anything wrong, except upon the terms of paying what that person has advanced on the security of the deeds handed over to him. See the judgment of Lord Justice *Fry* in *Northern Counties of England Fire Insurance Company* v. *Whipp* (2). The legal right to hold the deeds was in the *Union Bank*, and was transferred to the *London and South Western Bank*; this right has passed to the Defendants; and the only terms on which in equity the Plaintiff is entitled to redeem the deeds which the Defendants hold, are on repayment of the moneys which the Defendants paid to the *London and South Western Bank* in respect of the advances made by that bank on the security of the deeds, with interest on what the Defendants so paid. These are the terms imposed by the judgment appealed from, and the appeal must be dismissed with costs.

LOPES, L.J.:—

I agree with Lord Justice *Lindley's* judgment, and will shortly state my reasons.

Brocklesby, the father, owed the *Union Bank* £750, and he wanted to raise £1500. The deeds were deposited with the *Union Bank* to secure the £750, which still remained due. *Brocklesby's* son persuades him that the £1500 can be raised on better terms with his bankers than with the *Union Bank*, and obtains from his father two documents of the 30th of May and of the 3rd of June, and his father the next day gives him the letter of the 4th of June. I do not think that letter of the 4th of June is a cancellation of the one of the 3rd of June, but rather an amplification of it. The important question is, What authority was given by the father to the son? That depends upon the two letters and the parol evidence. I have, after a careful consideration of the letters and the parol evidence, come to the conclusion that the father authorized and permitted the son to have the

(1) Law Rep. 10 Eq. 92. (2) 26 Ch. D. 492–4.

C. A.
1893
BROCKLESBY v TEMPERANCE PERMANENT BUILDING SOCIETY
Lopes, L.J

control of the deeds for the purpose of paying off the £750 to the bank and for the purpose of raising the £1500; he had authority to pledge those deeds to the extent of £2250. The father in no way interfered in the transaction—it was left entirely to the son; he was to get the £2250 from his own bankers—this the father knew. How could he get it unless he had the power of dealing with the deeds which were to form the security upon which the money was to be advanced? The father left it to the son to negotiate the transaction with his, the son's, bankers, and allowed him to have the control of the deeds for that purpose. On the authority of *Perry-Herrick* v. *Attwood* (1), the father who left the deeds in the hands of the son for the purpose of raising money, cannot insist as against those who in reliance on the deeds lent the money that the son exceeded his authority.

The result is that the Plaintiff must pay, not only the £2250, but the whole of the sums advanced, with interest, in order to redeem the deeds.

A. L. SMITH, L.J.:—

This is an action brought by the Plaintiff to redeem two securities held by the Defendants upon payment of the sum of £2267 11*s.* 9*d.*, the Defendants insisting that they are entitled to keep the securities until they have been repaid the whole of the amounts advanced by them thereon, viz., the sum of £3600.

The question turns upon the true view of some transactions which took place in the year 1891. The Plaintiff, who is a solicitor, in the month of May, 1891, owed the *Union Bank* of *London* £750 and some interest thereon, and the bank then held as security therefor the title-deeds of certain properties. At this date the Plaintiff was desirous of paying off this loan and also of raising a further sum of £1500; whereupon his son, who was also his partner, suggested that his bankers, Messrs. *Ashby & Co.*, would make the required advance for that purpose. To carry this out the Plaintiff signed and handed to his son the following documents:—[His Lordship read the documents of the 30th of May and the 3rd of June, 1891, before mentioned.] This document of the 3rd of June, in my judgment, is a clear

(1) 2 De G. & J. 21.

authority to the son to obtain from the *Union Bank* of *London* the deeds deposited with them as security for the loan of £750 then due thereon, and the suggestion that it was only an authority to Messrs. *Ashby & Co.* to receive the deeds is untenable.

On the 4th of June he handed this further document to his son:—[His Lordship read the document.] We know what in fact had then been arranged between the father and son. The son was not only to get this £750 paid off, but he was also to obtain for the father from his bankers the loan of £1500, and it is manifest that until the deeds were freed from the *Union Bank* the £1500 could not be obtained, for it was upon the security of these deeds that *Ashby & Co.* were to advance the £750 and £1500. But it is said that this is not so, and it is contended that the document given by the father to the son on the 4th of June, 1891, cancelled that of the 3rd of June and altered the position of the son. It is said that after the 4th of June the son had no authority to receive the deeds, though it is clear he still had authority to borrow the £1500. The document of the 4th of June was attacked by the Defendants as being a concocted document; but Mr. Justice *Wright* has found that this is not so, and that it was made at the time it bears date, and that this suggestion as well as other imputations upon the Plaintiff had failed. As a matter of fact the son, instead of borrowing the £2250 as contemplated from Messrs. *Ashby & Co.*, borrowed £3500 unknown to the father from the *London and South Western Bank*, and gave that bank a forged memorandum of deposit and a forged promissory note, dated the 9th of June, 1891, and the 3rd of July, 1891, in that behalf, he having obtained the deeds from the *Union Bank* of *London* by using the authority of the 3rd of June, 1891. Between the 9th of June, 1891, and the 13th of May, 1892, when the son absconded, he was guilty of numerous forgeries and frauds, and, amongst others, defrauded the two Defendant companies out of the sums advanced by them upon the security of the deeds now sought to be redeemed. The Plaintiff in his evidence in chief only spoke of the document of the 4th of June; but upon cross-examination he had to admit the authenticity of the documents of the 30th of May and the 3rd of June, which he had given to his son, and when

C A.
1893
BROCKLESBY v TEMPERANCE PERMANENT BUILDING SOCIETY.
A. L Smith, L.J.

pressed he suggested that he gave the document of the 4th of June so as to prevent his son getting the deeds. This is a remarkable explanation, seeing that he had given the document of the 3rd of June to his son wherewith to get the deeds, and had on the next day handed to his son—not to *Ashby & Co.*, it will be noticed—the document of the 4th of June, and also left that of the 3rd of June still in his son's possession. In my judgment, upon the evidence and documents in this case, the real transaction between the father and the son was that the father authorized the son to obtain the deeds from the *Union Bank*, with the intention that the son should deposit them with Messrs. *Ashby & Co.*, so as to obtain the advances they were then supposed to be about to make thereon on behalf of the father, and that the document of the 4th of June was not, as is now contended by the Plaintiff, a document limiting the authority of the son, but was a document intended to give, and which gave, further powers to Messrs. *Ashby & Co.* It seems to me that Mr. Justice *Wright* certainly did not find to the contrary of this, and there are passages in his judgment which shew that he took a like view of the transaction.

Then, what are the rights of the Defendants in such a state of facts? It has long since been decided that a Court of Equity will grant no relief to a person who hands over his title-deeds to another with the intention that that other should obtain an advance of money thereon, no matter how much that other may exceed his authority in the advances he obtains, until the person who has so handed over his deeds pays to the lender the actual amount advanced by him upon the deeds, the reason being that the person claiming back the deeds has by his own act allowed another to become a *bonâ fide* purchaser for value without notice of the limited authority; and in these circumstances a Court of Equity will not assist him until the person who had thus been induced to part with his money has been fully recouped. The case of *Perry-Herrick* v. *Attwood* (1) decides this. This case, as far as I know, has never been doubted; and indeed, in *Northern Counties of England Fire Insurance Company* v. *Whipp* (2), Lord Justice *Fry*, dealing with *Perry-Herrick* v. *Attwood*, said:

(1) 2 De G. & J. 21. (2) 26 Ch. D. 492.

"This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist, as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority."

The point as to an estoppel by negligence, combatted so much by the Plaintiff's counsel upon this appeal, I need not allude to, for it was not argued or insisted upon by the Defendants. The above-mentioned equity, however, they did insist upon, and in that they were right. For these reasons, in my opinion, the judgment of Mr. Justice *Wright* in the Defendants' favour is correct, and this appeal must be dismissed.

Solicitor for the Plaintiff: *G. J. Brocklesby.*

Solicitors for *Temperance Permanent Building Society*: *Shaen, Roscoe, Massey, & Co.*

Solicitors for *Nineteenth Century Building Society*: *Griffinhoofe & Brewster.*

M. W.

CHITTY, J.
1893
June 13, 14

In re RICHERSON.
SCALES *v.* HEYHOE (No. 2).

[1890 S. 2760.]

Practice—Parties—Legal Personal Representative—Estate of Deceased Person—Proceeding in Absence of Representative—Order dispensing with Representative—Binding on Estate of Deceased Person—Rules of Supreme Court, 1883, *Order* XVI., *r.* 46; *Order* LV.

When an order is made under Order XVI., rule 46, it should appear on the face of the order, to render it binding on the estate of a deceased person, either that the Court, having had its attention called to this point, has dispensed with the legal personal representative of the deceased person interested in the matter, or has appointed some person to represent the estate.

JOHN RICHERSON by his will, dated the 15th of July, 1863, after appointing his wife *Mary Richerson*, his niece *Susan Scales*, *John Crowe*, and *Edward William Balders*, executors and trustees, bequeathed to them all his residuary personal estate upon trust from and after the decease of the survivor of his wife and his sister *Sarah Scales*, to invest as therein mentioned and pay one moiety of the annual dividends or interest to his (the testator's) nephew *William Scales*, during his life, and the other moiety of such dividends or interest to the said *Susan Scales* during her life, and in case *William Scales* or *Susan Scales* should leave any lawful issue him or her surviving, then the testator directed and declared that all such residuary personal estate should after the decease of the survivor of them, the said *William Scales* and *Susan Scales*, be equally divided between and amongst such lawful issue in equal shares and proportions; but in case neither of them should leave any lawful issue him or her surviving, then the testator directed and declared that all such residuary personal estate should be equally divided between and amongst all his next of kin that might be living at the decease of the survivor of them, the said *William Scales* and *Susan Scales*, according to the statute for the distribution of the estates and effects of persons dying intestate.

The testator died on the 13th of September, 1864.

There were living at the death of the testator (1.) his widow *Mary Richerson*; (2.) his sister *Sarah Scales*, who was his heiress-at-law and sole next of kin; (3.) his nephew *William Scales* (a son of the said *Sarah Scales*); (4.) his niece *Susan Scales* (a daughter of the said *Sarah Scales*); (5.) the Plaintiff, *Sarah Jane Scales*, who was the only daughter of *John Richerson Scales*, a son of the said *Sarah Scales*, who had died in 1860.

Mary Richerson, the testator's widow, died on the 12th of May, 1871, having made a will by which she appointed the said *Edward William Balders* her executor.

Sarah Scales, the testator's sister, died in the year 1872 intestate, leaving the said *William Scales* her eldest son and heir-at-law, and the said *William Scales*, *Susan Scales*, and the Plaintiff *Sarah Jane Scales* her next of kin.

Susan Scales died on the 18th of May, 1879, having made her will, whereof she appointed the said *E. W. Balders* executor.

John Crowe died in December, 1879. *E. W. Balders* died in November, 1888, having made his will, whereof he appointed *Robert Heyhoe* and *William Henry Plowright* executors.

In April, 1890, an originating summons (*In re Richerson. Heyhoe* v. *Scales*, 1890 R. 753) was taken out by *Heyhoe* and *Plowright*, who were the legal personal representatives of the testator, and also of his widow *Mary Richerson* and his niece *Susan Scales*, and in which *William Scales* was sole Defendant, asking among other things whether *William Scales* became entitled on the death of *Susan Scales* to the whole of the income of the residuary personal estate of the testator during his life.

By an order made on the summons on the 11th of August, 1890, it was declared that *William Scales* was entitled as from the death of *Susan Scales* by implication during his life to the moiety of the income of the residuary personal estate of the testator bequeathed to *Susan Scales* during her life as well as to the other moiety of such income.

Prior to the issue of the above summons, a correspondence had taken place between the solicitors of *Sarah Jane Scales* and the solicitors of *Heyhoe* and *Plowright* with regard to the course to be pursued, and in the result the summons was issued without making *Sarah Jane Scales* a party, and was heard and disposed

CHITTY, J.

1893

In re RICHERSON SCALES *v* HEYHOE (No 2).

of in her absence, and no properly-constituted person was made a party to represent the interests of those interested in contending that there was an intestacy in respect of the income mentioned in the said order. A copy of the order was served on the solicitors of *Sarah Jane Scales*, who had in July, 1890, commenced this action against the trustees, *Heyhoe* and *Plowright*, claiming the appointment of new trustees and the execution of the trusts of the will, and she also claimed by her amended statement of claim a declaration that any part of the order of the 11th of August, 1890, which was detrimental to her interests either in her own right or as representing the estate of *Sarah Scales*, to whom she had, after the issue of the writ, obtained administration, was not binding on her. The representatives of *William Scales*, who had died in October, 1890, were also added as parties.

The action now came on for hearing as to the construction of the clause in the will above set out; but the only question calling for a report was as to whether the order of the 11th of August, 1890, was or not binding on the Plaintiff.

Levett, Q.C., and *Sargant*, for the Plaintiff:—

The order of the 11th of August, 1890, is not binding on the Plaintiff, as there is nothing on the face of the order to shew that the Court dispensed with the legal personal representative of *Sarah Scales*, as required by rule 46 of Order XVI. The Plaintiff was interested in contending that there was an intestacy as to *Susan Scales'* moiety of the income during the life of *William Scales*, and the trustees were incompetent to deal with her interest, as they had treated *William Scales* as entitled.

With regard to the question of construction, we contend that no estate by implication arose in favour of *William Scales*.

Farwell, Q.C., and *Kenyon Parker*, for the representatives of *William Scales*:—

Under rule 46 of Order XVI. the Court has jurisdiction to proceed in the absence of the legal personal representative of any deceased person interested in the matter in question. At the date of the order the Plaintiff had not taken out adminis-

tration; she was, however, aware of the proceedings, and is bound by the order.

The 46th rule is adapted with slight alteration from sect. 44 of the *Chancery Procedure Act* (15 & 16 Vict. c. 86); and in *Curtius* v. *Caledonian Fire and Life Insurance Company* (1), it was held that the Court had jurisdiction to dispense with a legal personal representative where none exists.

We contend that the order of the 11th of August, 1890, was right, and that *William Scales* became entitled by implication to the whole of the income.

Byrne, Q.C., and *Marcy*, for the trustees of the will.

CHITTY, J.:—

The Plaintiff was not a party to the proceedings in Chambers on the summons. No fault is to be imputed to the trustees on this account; for although they were aware that the Plaintiff had some claim in the matter, she did not insist on being made a party, and the summons was heard and disposed of in her absence.

The question is whether the Plaintiff is bound by the order made on the summons. It is true that she had not at the date of the order on the summons clothed herself with her right as legal personal representative of her grandmother, *Sarah Scales*, the testator's sole next of kin; but it is the ordinary practice of the Court to allow the person entitled to take out representation to be added as a party; and in the event of its being shewn that the deceased's estate is entitled to some interest, the order does not go till letters of administration have been taken out. In my opinion, the Plaintiff is not bound by the order of the 11th of August, 1890.

On the true construction of rule 46 of Order XVI. it is necessary that the order of the Court should state that the Judge has proceeded in the absence of any person representing, or entitled to represent, the deceased's estate, or has appointed some person to represent it, and my opinion is founded on the language of the order itself. There need not be a separate order to this

(1) 19 Ch. D. 534.

CHITTY, J.

1893

In re RICHERSON SCALES v. HEYHOE (No. 2)

effect; but it must appear on the face of the order that the Court dispensed with the representative. This is apparent from the terms of the rule. "The order so made, and any order consequent thereon," applies, of course, to the case where the Court appoints some person to represent the estate, and equally applies, in my opinion, where the Court proceeds in the absence of a representative. But there must be a *constat* on the face of the order that the attention of the Judge was called to the point, and that he decided to proceed.

On a summons under Order LV., the Court is not bound to have before it all the persons whose interests may be affected by the order, as in an old suit in Chancery: that is one of the advantages of the order; and the decisions shew plainly that where the Court does not require other persons to be served with the summons under rule 6 of Order LV., there is no necessity for the Court to express this on the face of the order. But Order LV. was subsequent in date to rule 46 of Order XVI., and it affords no ground for varying that rule. Under that rule I think the decision of the Court to proceed must be shewn on the face of the order.

It has been the constant practice to draw up orders either dispensing with the representative or appointing some person to represent the estate. Although, therefore, I am deciding the point for the first time, my decision is not a new one, but is in accordance with the established practice.

On the question of the construction of the will the Court adhered to the decision arrived at in Chambers on the 11th of August, 1890, following *Armstrong* v. *Eldridge* (1) and *Pearce* v. *Edmeades* (2).

Solicitors: *Morgan, Price, & Mewburn; E. Robinson*, agent for *Grigson & Robinson, Watton, Norfolk; Barlow & James*, agents for *A. J. Winter, Swaffham.*

(1) 3 Bro. C. C. 215. (2) 3 Y. & C. Ex. 246.

G. M.

ATTORNEY-GENERAL *v.* ST. JOHN'S HOSPITAL, BATH.

NORTH, J.
1893
June 24.

[1864 A. 96.]

Railway Company—Compulsory Purchase of Land—Re-investment of Purchase-money—Costs—Petitioner's Costs limited to Costs of Summons—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Rules of Supreme Court,* 1883, *Order* LV., *r.* 2.

A petition was presented for the transfer to the official trustees of charitable funds of three sums of stock which had respectively arisen from the investment of the purchase-moneys paid by three railway companies for land belonging to a charity which they had taken under their statutory powers. The three sums of stock respectively amounted to £1244, £44, and £36:—

Held, that the costs payable by each of the two companies, whose purchase-moneys were represented by the two smaller sums of stock, must be limited to the amount which the company would have had to pay in case the application had been made by summons.

PETITION asking for the transfer and payment of some sums of stock and cash, which were in Court in the suit, to the official trustees of charitable funds, in trust for the above charity.

The suit was commenced in August, 1864, by information, for the ascertainment of the property of the charity, and the settlement of a scheme for its future administration.

Under an order dated the 29th of November, 1872, the *Midland Railway Company* paid into Court in the suit the sum of £1150, as the purchase-money of some land belonging to the charity which the company had taken under their statutory powers. This land was afterwards conveyed to the company.

Under another order, dated the 15th of November, 1872, the *Somerset and Dorset Railway Company* paid into Court in the suit the sum of £41, as the purchase-money of other land of the charity which that company had taken under their statutory powers, and this land was afterwards conveyed to the company.

Under a third order, dated the 16th of November, 1876, the *Bristol and North Somerset Railway Company* paid into Court in the suit the sum of £35, as the purchase-money of other land of

NORTH, J
1893
ATTORNEY-GENERAL v. ST. JOHN'S HOSPITAL, BATH

the charity which that company had taken under their statutory powers, and this land was afterwards conveyed to the company.

The three sums of purchase-money were afterwards invested in Consols.

In June, 1877, a scheme for the administration of the charity was approved by the Court.

In 1884 the undertaking of the *Bristol and North Somerset Company* was vested by statute in the *Great Western Railway Company.*

The petition was presented by the master of the hospital and the trustees of the charity, with the authority of the Charity Commissioners, which had been given subject to the stipulation that the *Midland Railway Company* should pay £40 for the benefit of the charity, in lieu of their liability to defray the costs of re-investment in land of the sum of stock which had arisen from the investment of the £1150, and towards the expenses of and incidental to the present application. The *Midland Railway Company* had agreed to pay the £40.

When the petition was presented there were in Court the three sums of £1244 18*s.* 6*d.*, £44 7*s.* 9*d.*, and £36 8*s.* 3*d.*, which had respectively arisen from the investment of the three sums of £1150, £41, and £35, and three sums of cash which respectively represented dividends which had accrued due on the three sums of stock respectively.

The petition asked that the three sums of stock might be transferred, and that the three sums of cash might be paid, to the official trustees of charitable funds, in trust for the charity. The petition also asked for a declaration that, pursuant to sect. 80 of the *Lands Clauses Consolidation Act*, 1845, the taxed costs of the Petitioners as thereby provided for, including therein all reasonable charges and expenses of and incidental to the present application, and of all proceedings relating thereto, ought to be borne by the three companies in equal shares; that the *Midland Railway Company*, in pursuance of their agreement, might be ordered to pay to the Petitioners £40 for the benefit of the charity, in respect of the one-third share of the said costs which ought to be borne by that company; and that the *Somerset and Dorset Company* and the *Great Western Company* might be respectively

ordered to pay to the Petitioners one third share of the said costs.

Baden Fuller, for the Petitioners, cited *Re Rector and Churchwardens of St. Alban's, Wood Street* (1) as an authority that, a petition having been necessary because one of the sums of Consols exceeded £1000, each of the three companies ought to pay one-third of the Petitioners' costs, the costs payable by the *Midland* being limited, in pursuance of the agreement, to £40.

Medd, for the *Great Western Company*; and *Nash*, for the *Somerset and Dorset Company*; asked that the costs payable by those companies respectively might be limited to the costs which they would have had to pay in case the application had been, under rule 2 of Order LV., made by summons instead of by petition.

NORTH, J.:—

I do not disagree with the case which has been cited; but its circumstances were different from those of the present case, and I do not think it applies I direct that the costs, payable by the *Great Western* and the *Somerset and Dorset Companies* respectively, shall not exceed the amounts which they would respectively have had to pay in case this application had been made by summons. This does not increase the costs payable by the *Midland Railway Company*.

Solicitors: *Torr & Co.*, agents for *E. Newton Fuller, Bath; R. R. Nelson; Bircham & Co.*

(1) 66 L. T. (N.S) 51.

W. L. C.

NORTH, J.
1893
June 27, 28.

In re TIDD.
TIDD *v.* OVERELL.

[1892 T. 229.]

Bailment—Deposit of Money—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3.

Time does not begin to run under the *Statute of Limitations* (21 Jac. 1) against a person who has entrusted money to another for safety till demand, though it was contemplated that the bailee might use the money in business.

THE Plaintiff *Charles Tidd* sued the Defendants as executors of his deceased brother *George Tidd.* The Plaintiff claimed payment of the sum of £300. The Defendants pleaded "the statute of 21 Jac. 1, c. 16, and all other *Statutes of Limitation* in that case made and provided." There was a counter-claim not material for the purpose of the report.

Previously to the year 1875 the Plaintiff was engaged in partnership with his brother *William* in the business of farmers. In that year they dissolved partnership on terms settled by reference to their eldest brother *George,* the testator in this action. The terms were finally settled at an interview held at the house of *George Tidd* at *Cadicote Farm, Hertfordshire,* in or previously to October, 1875. *William Tidd* then paid a sum of £300 to the Plaintiff in two £50 bank of *England* notes and a cheque for £200 drawn in favour of *William Tidd.* The Plaintiff handed the documents to *George Tidd,* saying, "You may as well take care of it till I want it," or to that effect. A witness of the name of *Bigg* was present, who made a jocular remark to the effect that he could take care of it; and the Judge inferred from the evidence that it was in the minds of the parties present that the money might be useful to *George* in his business.

The Plaintiff shortly afterwards went to live with his brother *George,* and lived with him till he died. *George* had two farms; the Plaintiff acted as farm-bailiff, and managed one of the farms for his brother. He never received any pecuniary remuneration for his services, and never paid anything for board or lodging.

No demand was made by the Plaintiff during the life of the testator for payment of the £300; no interest was paid in respect of it; and nothing passed between the two brothers in respect of it. The money was paid into the current account of the testator in October, 1875. The testator died in March, 1892, having appointed the Defendants his executors.

Micklem, for the Plaintiff:—

This money was deposited with *George Tidd* as bailee for safe custody; no action could have been brought for it till demand. The statute did not, therefore, begin to run till demand, and no demand was made in the life of the testator: *Wilkinson* v. *Verity* (1); *Miller* v. *Dell* (2). Here the depositee became a trustee or agent, and on that account the statute did not apply: *Burdick* v. *Garrick* (3); *In re Hindmarsh* (4); *Banner* v. *Berridge* (5). The case of money paid into a bank on current account is exceptional. I admit that in that case the law is that the amount held by the bank is a simple debt, in respect of which time runs under the statute without demand: *Pott* v. *Clegg* (6); *Foley* v. *Hill* (7). Assuming the position of *George* to have been analogous to that of a banker, this money was held by him on the footing of money placed on a deposit account. It was not intended to be drawn upon, but to be held till demanded as a whole, and therefore time did not begin to run till demand: *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (8).

Cozens-Hardy, Q.C., and *P. B. Abraham*, for the Defendants:—

The case is undistinguishable in principle from *Pott* v. *Clegg* and *Foley* v. *Hill*. Where money is paid in on a deposit account with a banker, the case is distinguishable, because some document has to be given up, notice has to be given, or some condition to be fulfilled by the depositor before he can get his money back. Here the money was held simply

(1) Law Rep. 8 C. P. 206.
(2) [1891] 1 Q. B. 468.
(3) Law Rep. 5 Ch. 233.
(4) 1 Dr. & Sm. 129.
(5) 18 Ch. D. 254.
(6) 16 M. & W. 321.
(7) 2 H. L. C. 28.
(8) 25 Q. B. D 377.

NORTH, J.
1893
In re TIDD
TIDD v. OVERELL

as a loan. The transaction was for the benefit of *George*, who was intended to and did use it for his business purposes.

NORTH, J. (after considering the evidence, continued):—

The question is, What is the real position of *George Tidd* in respect of this money? I believe he took it for the purpose of safe custody and nothing else. The transaction was not simply a loan, and it does not come within the well-known cases of *Foley* v. *Hill* (1) and *Pott* v. *Clegg* (2). But assuming it to be like the deposit of money with a banker, I think it more like the cases in which money is paid into a bank on a deposit account. The usual practice when money is paid in on a deposit account is, that the deposit note is handed back in exchange for the money: possibly, also, notice is necessary before money on deposit can be called back. It seems to me that the money here was received, not as a loan, but as a trust for safe custody: and the parties present seemed to think *George* might use it in the meantime. I think the case falls within the principle put by *Pothier*. I do not find there has been any dissent from the view of *Pothier* in any reported case: although I do find that the same rule is not applied to the case of money paid into a bank on current account. The passage in *Pothier* is this: "Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand" (3). That seems to me the law of *England*. The case nearest the present is that of *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (4). Money had been lent to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out by the society except on production of a

(1) 1 Ph. 399; 2 H. L. C. 28.
(2) 16 M. & W. 321.
(3) *Pothier* on Contracts, by *Evans*, vol. ii. p. 126.
(4) 25 Q. B. D. 377.

loan pass-book. There the arrangement was made in writing; here it was not. That does not in my opinion make any difference, when you once get, as I have here, at what the arrangement really was. In that case the money was to be repayable on demand, on the production of a document. In this case there is no document to be given back or produced, because there is no document; the money was to be kept in safe custody, and in my opinion the depositor was entitled in the present case only to have it back when he asked for it back; as in that case, he was entitled when he asked for it, and, in addition, when the loan-book was produced. In that case the Master of the Rolls (1), referring to the cases of *Foley* v. *Hill* (2) and *Pott* v. *Clegg* (3), says: "It has no analogy to the cases cited where money is deposited in a bank to provide for a current account. The case of money paid in on a deposit account would be very different, and we shall know how to deal with it when it comes before us." I cannot treat that as an authority that a deposit account does stand in a different position where no document has to be produced or given back before repayment. I have come to the conclusion that the testator stood in a fiduciary position to the Plaintiff. At first I thought the case was one of loan, but on hearing the arguments and the evidence I have come to the conclusion that the transaction was not a loan, but a deposit for safe custody; and will declare that the Plaintiff is entitled to be repaid the amount claimed.

Solicitors for Plaintiff: *Nield & Strouts.*

Solicitors for Defendants: *Mason, Phillips, & Cotton,* agents for *Sworder & Longmore, Hertford.*

(1) 25 Q. B. D. 380. (2) 1 Ph. 399; 2 H. L. C. 28.
(3) 16 M. & W. 321.

D. P.

KEKEWICH, J.

1893

June 6, 7.

FOSTER *v.* FRASER.

[1892 F. 1425.]

Covenant—"Building"—Hoarding—Breach—Injunction.

The conveyance of part of a residential estate contained a covenant by the grantee that any "building" which should be erected on the land should be of a certain height and have a stuccoed front and slated roof, and be used only as a dwelling-house:—

Held, that the erection of an advertisement hoarding was not prohibited by the covenant.

By deed dated the 25th of February, 1869, one *Foale*, the owner in fee by purchase of part of a residential estate in or near *Kingston-upon-Hull*, and of part of a row of houses upon it called "*Spring Bank*," conveyed two plots of ground of which he was thus owner to the Defendant *Fraser* in fee, *Fraser* covenanting with *Foale*, his heirs and assigns, to observe certain covenants entered into by *Foale* when he purchased the property, and therein stated as follows: "That any building which shall hereafter be erected upon the said piece or parcel of land secondly hereinbefore described, fronting the *Spring Bank* aforesaid, shall be at least thirty-six feet in height from the level of the said flagged footpath, and shall have a stuccoed or cemented front and a slated roof; and that any building which shall hereafter be erected on the said piece or parcel of land firstly hereinbefore described shall be at least twenty-two feet from the level of the said flagged footpath; and any buildings thereon which face the east shall have a stuccoed or cemented front; and any buildings facing the north shall be fronted with white stock bricks and have slated roofs; and such buildings respectively shall be used only as dwelling-houses; and that no tenements or other outbuildings shall be erected upon the said pieces or parcels of ground, or any part thereof respectively, to be occupied as tenements or as courts or squares or otherwise separately from the said front messuages or dwelling-houses."

In June, 1892, the Defendants, the *Hull and Grimsby Bill*

Posting and Advertising Company, Limited, under a license from the Defendant *Fraser*, erected on his land a hoarding of a substantial character, supported by struts and outposts and varying from eight to fourteen feet in height, and proceeded to use it as an advertising station. The Plaintiff, the devisee in trust and executor of *Foale*, alleged that the covenants were intended as a protection to the estate, and complained that this hoarding was an annoyance to himself and his tenants, and had depreciated and would depreciate the value and amenity of his property and of the estate generally. He accordingly brought this action for alleged breach of the covenants and for an injunction. The action now came on for trial.

The only question requiring a report was whether the hoarding was a "building" within the meaning of the above covenants.

Renshaw, Q.C., and *Maidlow*, for the Plaintiff, contended that the hoarding was a "building" within the meaning of the covenant, and therefore that there had been a breach of it: *Bowes* v. *Law* (1); *Master* v. *Hansard* (2); *Child* v. *Douglas* (3); *Pocock* v. *Gilham* (4).

Warmington, Q.C., and *J. G. Wood*, for the Defendant *Fraser*, and *C. T. Mitchell*, for the Defendant company, contended that a hoarding was not within the covenant which pointed to a building in the nature of a house. [They referred to *Slaughter* v. *Mayor of Sunderland* (5); *Hibbert* v. *Acton Local Board* (6); *Skeat's* Dictionary, "to build."]

[KEKEWICH, J., referred to *Harris* v. *De Pinna* (7); *Lands Clauses Consolidation Act*, 1845, *s.* 92, and the *Century* Dictionary, "building."]

Renshaw, in reply, cited *Lord Manners* v. *Johnson* (8), and *Stevens* v. *Gourley* (9).

(1) Law Rep 9 Eq. 636.
(2) 4 Ch. D. 718.
(3) 5 D. M. & G. 739.
(4) 1 Cab. & El. 104.
(5) 65 L. T. (N.S.) 250.
(6) 5 Times L. R. 274.
(7) 33 Ch. D. 238.
(8) 1 Ch. D. 673.
(9) 7 C. B. (N.S.) 99.

KEKEWICH, J.
1893
FOSTER v. FRASER.

KEKEWICH, J.:—

The question is, Is this hoarding a "building" within the meaning of the covenant? I have had cited to me several cases, including *Child* v. *Douglas* (1); *Bowes* v. *Law* (2); *Hibbert* v. *Acton Local Board* (3); and *Slaughter* v. *Mayor of Sunderland* (4). I myself referred to *Harris* v. *De Pinna* (5), a case arising under the *Prescription Act*. I have also myself suggested, as throwing some light upon the point, sect. 92 of the *Lands Clauses Act*, upon which many questions have arisen as to the meaning of the words "any house or other building or manufactory." All these cases are instructive as shewing what meaning is given by the Court to the word "building;" but they are only useful as illustrations shewing how one ought to deal with the word in connection with different contexts. Ultimately the question comes to this, What is the meaning of the word in this particular document? Is what has been erected a "building" within the meaning of this covenant? In my opinion, this is not at all an easy question, and for this reason. The covenant is not expressed in language as full as one could wish, and no doubt the construction is rendered a little more difficult by the fact that it does not shew the protection which it is intended to effect. It is not stated what are the purposes for which the covenant is put in. It is put in without any introduction or explanation. This is not an agreement or conveyance in which the grantee is bound to do anything. The grantee or purchaser, *Fraser*, is, according to the deed, at liberty to leave this property uncovered by anything at all. He might turn it into a market-garden or anything else. As long as he does not put up a building on it, he might use it for any purposes whatever. The deed does not contemplate that he should at any time build anything; nor is there any express covenant that he is to build a dwelling-house; but what is put in is to this effect, "If you do build, the building shall be of a certain kind." One kind is to have "a stuccoed or cemented front and a slated roof." That cannot apply to a hoarding such as this. Then another kind is to be "fronted

(1) 5 D. M. & G. 739.
(2) Law Rep. 9 Eq. 636.
(3) 5 Times L. R. 274.
(4) 65 L. T. (N.S.) 250.
(5) 33 Ch. D. 238.

with white stock bricks and have slated roofs." A hoarding such as this cannot be fronted with white stock bricks or have a slated roof. The meaning of the covenant seems to be this, that if you erect a building, such as a house, then it must be a house of a certain character. In my opinion the covenant does not relate to anything which cannot have a front or a roof; and it would be pushing the language of the covenant too far to say that it applies to a hoarding. I hold, therefore, that the words of the covenant do not point to anything of the kind, and that such a hoarding as this is not a "building" within the meaning of the covenant.

The defence accordingly succeeds, and there must be judgment for the Defendants, with costs.

Solicitors: *Redpath, Holdsworth, & Marshall,* agents for *Shackles & Son, Hull; James & James,* agents for *Thorney & Son, Hull; Bolton & Mote,* agents for *T. & A. Priestman, Hull.*

G. I. F. C.

In re MARQUIS OF BRISTOL'S SETTLED ESTATES.

[1893 B. 1169.]

Settled Land—Tenant for Life—Capital Money—Permanent Improvements—Application of future Capital Money for past Improvements—Rent-charges—Settled Land Act, 1882, *ss.* 21, 25; 1887, *s.* 1; 1890, *s.* 15.

The Court will not, under s. 15 of the *Settled Land Act,* 1890, make a prospective order directing future capital money to be applied in repayment to the tenant for life of money expended by him on permanent improvements he has already executed, or in repayment to him of moneys paid, or to be paid, in keeping down rent-charges created by him for raising money for such improvements.

In re Dalison's Settled Estate (1) considered.

ADJOURNED SUMMONS.

The Applicant, the third Marquis of *Bristol,* was, under a settlement dated in 1862, tenant for life of certain freehold and copyhold estates in the counties of *Suffolk* and *Lincoln.* Upon coming into possession of the title and estates on the death of

(1) [1892] 3 Ch. 522.

KEKEWICH, J.

1898

In re MARQUIS OF BRISTOL'S SETTLED ESTATES

his father in 1864, the Applicant proceeded to effect considerable permanent improvements on the estates, the improvements being, it was said, of a description subsequently authorized by the *Settled Land Act*, 1882, ss. 21 and 25, such as improving and repairing the farm-houses and buildings, which he found in a state of neglect. Part of the money required for the improvements he raised by creating terminable rent-charges under the *General Land Drainage and Improvement Company's Act*, 1849. The amount expended by him in keeping down the rent-charges since the 1st of January, 1883, when the *Settled Land Act*, 1882, came into operation, was £7104 0*s.* 4*d.*, and he was liable for a still larger sum for future payments. He had also expended out of his own pocket since the 1st of January, 1883, £13,530 upon the improvements. No scheme of the improvements had been submitted either to the trustees or to the Court under the provisions of the *Settled Land Act*, 1882.

This was an application by the Marquis, first, that the present trustees of the settlement might be directed to apply capital money arising under the *Settled Lands Act*, 1882 to 1890, "now in or hereafter to come into their hands subject to the settlement," in repayment to him of the moneys expended by him since the 1st of January, 1883, in respect of the rent-charges; secondly, that the trustees might be ordered to pay all sums "now due or hereafter to accrue" in respect of such rent-charges, or to redeem the same rent-charges, out of capital moneys subject to the trusts of the settlement; and, thirdly, that the trustees might be directed, out of the capital moneys arising under the said Acts, "now in or hereafter to come into their hands subject to the settlement," to repay to the Marquis the £13,530 expended by him since the 1st of January, 1883, on the permanent improvements, although no scheme was, before the execution thereof, submitted for approval, pursuant to the *Settled Land Act*, 1882, s. 26, either to the trustees or to the Court.

The amount of capital moneys at present in the hands of the trustees was only £4815 3*s.* 5*d.*

The tenant for life never made any formal request to the trustees to have his expenditure repaid out of capital money; but on the 9th of February, 1892, his estate agent wrote to one

of the trustees asking his opinion as to how a portion at least of the expenditure might be repaid, and reminding him that the trustees had a sum of about £5000 capital money in their hands.

Warmington, Q.C., and *Swinfen Eady*, for the Applicant:—

This application is made under sect. 15 of the *Settled Land Act*, 1890 (1), and we submit that under that section an order may be made authorizing the application of capital money coming to the hands of the trustees towards such improvements already executed as are authorized by the *Settled Land Acts*.

[*W. C. Druce*, for the trustees:—There are two points of law raised by this summons; first, whether the trustees may apply future capital moneys towards past improvements, having regard to the recent case of *In re Millard's Settled Estates* (2), and, secondly, whether, having regard to *In re Dalison's Settled Estate* (3), the trustees can apply any capital moneys at all in repayment to the tenant for life of the sums expended by him in keeping down the improvement rent-charges.]

In re Millard's Settled Estates does not apply to a case such as this, where the improvements have already been executed: there the question was whether the Court could make a prospective order for payment for work proper to be done yet not actually done. All that is necessary here is to direct an inquiry what have been the improvements upon which capital money may properly be expended, and then to direct the trustees under sect. 15 to repay to the tenant for life the amount he has so expended.

With regard to *In re Dalison's Settled Estate*, we submit that sect. 15 of the *Settled Land Act*, 1890, should be read with sect. 1 of the *Settled Land Act*, 1887, which provides that any capital money paid in respect of a rent-charge created for paying off moneys advanced for improvements shall be deemed

(1) Sect. 15 is as follows: "The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the *Settled Land Acts*, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court."

(2) *Ante*, p. 116.

(3) [1892] 3 Ch. 522.

KEKEWICH, J.

1893

In re MARQUIS OF BRISTOL'S SETTLED ESTATES.

to be applied in payment for improvements authorized by the Act of 1882; and that the effect of so reading sect. 15 is to enable the Court to sanction the application of capital moneys in repayment of moneys expended on a rent-charge prior to the Act of 1887; in short, that sect. 15 is retrospective. *In re Howard's Settled Estates* (1) decided that a tenant for life could not get back money paid by him before the passing of the Act of 1887; but that Act gave him a new right, that is, a right to be recouped all moneys paid by him from and after the passing of the Act. *In re Dalison's Settled Estate* (2), at all events, only applies so as to limit our right to repayment of moneys expended since the passing of the Act of 1887. We therefore ask that present and future capital moneys in the hands of the trustees may, as regards the rent-charge payments, be applied at all events in recouping payments made by the tenant for life since the Act of 1887, and also in recouping him such expenditure as can be ascertained to have been for permanent improvements. There is nothing in *In re Millard's Settled Estates* (3) to prevent the Court from saying that, so far as the capital money already in the hands of the trustees is not sufficient to recoup the tenant for life for moneys expended by him in permanent improvements, there may be a prospective order binding future capital moneys, instead of leaving the tenant for life to make repeated applications whenever he finds there is capital money come into the hands of the trustees.

W. C. Druce, for the trustees.

KEKEWICH, J.:—

As regards the point which is raised in connection with *In re Dalison's Settled Estate*, I shall, as a matter of course, follow Mr. Justice *Stirling*. It would be very wrong of me to do otherwise, even if I thought that his judgment was wrong. I have not had occasion to consider it before; but, so far as I have considered it now, it commends itself to my judgment. Mr. Justice *Stirling* had to consider in that case the 15th section of

(1) [1892] 2 Ch. 233. (2) [1892] 3 Ch. 522.
(3) *Ante*, p. 116.

the Act of 1890, and he held that the Court could not, under that section, direct the trustees to apply capital moneys (I drop the words "in their hands") in repaying to the tenant for life instalments of rent-charges of this character paid by him before the matter came under the consideration of the Court. He apparently considered in Chambers a question which was not argued in Court, namely, whether, if a tenant for life made a request to the trustees, that is to say, insisted on his right, subject to the discretion of the Court, to have the money required to meet the rent-charges provided out of capital money, the application might not from that date be regarded as *sub judice*, so that, if any delay occurred, the Court might act retrospectively to that extent, and recoup the tenant for life sums which, under the exigency of the deed creating the rent-charge, he would be bound to pay, pending the application to the Court; and the learned Judge thought that might be done. In that respect, also, I should follow Mr. Justice *Stirling*.

Then it is said that there is a letter here of the 9th of February, 1892, which is equivalent to such a request. I cannot so read it. The agent of the tenant for life, acting on behalf of the tenant for life, writes to one of the trustees to find out what could be done. He does not for a moment insist upon a right; he does not suggest an application to the Court; he does not even put it otherwise than asking for a friendly opinion. I think it would be going a good deal further than Mr. Justice *Stirling's* decision, and it would be really inconsistent with it, if I were to hold that that letter would be a sufficient request.

Therefore, on those two points, I follow Mr. Justice *Stirling* without saying more.

Then there is another question of some little interest, because it is affected by the decision of *In re Millard's Settled Estates* (1). What happened in that case was this. It was desired to sell some property as building land, and for the purpose of such sale it was desired, according to the common course in such matters, to lay out the roads, approaches, and, I think, also sewers, matters which might properly be treated as improvements under the *Settled Land Acts*, and to have them paid for out of capital

(1) *Ante*, p. 116.

KEKEWICH, J.
1893
In re MARQUIS OF BRISTOL'S SETTLED ESTATES.

money. There was no doubt, and nobody suggested a doubt, that the property would sell very much better if those things were done; but unfortunately the trustees had no money in hand, and the question arose whether the Court could properly sanction those improvements to be made out of capital money, there being none in hand, and the whole thing being prospective. The Court of Appeal decided that that could not be done; and, no doubt, the judgments of the Court of Appeal did not rest entirely or in part on the fact that there was no money in hand. That was not the only question or the principal question which they considered, and it would be wrong to strain the language of the Lords Justices into a decision on that neat point; but the reasoning of Lord Justice *Lindley* and Lord Justice *Lopes* seems to point to the conclusion that the capital money must be in hand. However, I do not think I ought to take it as a clear decision on that point; but if one turns to the section which the Lords Justices were considering, and to the section which I have to construe, it seems to me to be reasonably clear that such was the intention of the Legislature, and the proper construction of this section. No doubt now I am considering the 15th section of the Act of 1890; but, in order to understand that Act, I must consider the sections of the earlier Act which the Court of Appeal had under their consideration in *In re Millard's Settled Estates* (1). I must read them all together. The whole notion, as explained by Lord Justice *Lindley*, seems to me to be that the Court is to approve some scheme for laying out money on something, and that there must be money to be expended. There is not the slightest hint in the Act of 1882 as to any money hereafter to come. What is contemplated is expenditure. What do you "expend"? You "expend" that which you have. A man cannot spend what he has not got—he can mortgage or pledge, but he cannot actually spend; and, I repeat, the whole notion of the Act is expenditure of something in hand. There is no hint of a charge on future capital to arise hereafter. It seems to me there would be very great difficulty in holding that if expenditure were sanctioned now, there being no money out of which that could be made, there would not be

(1) *Ante*, p. 116.

a charge which would have to be raised in the same way as any other charge on the land.

Now I turn to sect. 15 of the Act of 1890. There is not a single word in the section with regard to this point. It says: "The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied." "Capital money" is what has been defined by the principal Act, and must mean, according to the construction which I put upon it, capital money which is capable of application. The use of the word "applied," which is used frequently in the Act, again points in the same direction as the word "expenditure."

But beyond that I wish to make this observation. The section says, "The Court may, in any case where it appears proper"—that gives a discretion to the Court. If there has been an improvement, it does not at all follow that the Court is to authorize the money to be applied in or towards that improvement. The Court is to consider all the circumstances. The Court has a discretion—a judicial discretion of course, but still a discretion; and that is exemplified very strongly by the decision of Mr. Justice *North* in *In re Ormrod's Settled Estate* (1), which I mention only as an illustration of what is the discretion, otherwise I should have called counsel's attention to it. How is the Court to exercise that discretion if it has not got the facts before it? It seems to me that, if I were to say these improvements are to be paid for out of capital moneys hereafter to arise, I should abrogate my discretion altogether. I ought, when the proper time comes, to be able to consider, with the assistance of the trustees, whether the capital money would not be better applied to some other purpose, or whether the capital money proposed to be applied in this way bears a fair proportion, as regards such application, to other matters which require attention, and other details of that kind which occur to any one who has had to consider such schemes. But here I should be exercising my discretion in the dark if I were to adopt the argument on behalf of the Applicant, and hold that large amounts of money are to be applied in the manner now proposed as they arise from time to time, notwithstanding that, as they from time to time arise,

(1) [1892] 2 Ch. 318.

KEKEWICH, J.

1893

In re MARQUIS OF BRISTOL'S SETTLED ESTATES.

there may be much more urgent objects. On that ground, also, it seems to me that I ought not to make such an order as is asked. I think I ought not to surrender the discretion and put it out of my power to exercise that discretion properly for the benefit of the estate when the time comes.

Mr. *Warmington* says the result is that as money arises from time to time various applications will be necessary. So be it. That cannot be helped. To my mind it is very desirable that that should be so. I must trust the tenant for life not to come for a few hundred pounds at a time in a matter of this kind. If it is a matter of thousands, it is quite right that he should apply, and bring the facts before me with the assistance of the trustees, and I will then do my best to determine whether the proposed application is on the whole beneficial to the settled estates. Therefore I make no order.

Solicitors: *A. F. Coe; Dawson, Bennett, & Dawson.*

G. I. F. C.

DOWAGER DUCHESS OF SUTHERLAND *v.* DUKE OF SUTHERLAND.

ROMER, J.

1893

June 9, 10, 12, 13, 21.

[1892 S. 4005.]

Settled Estate—Lease by Tenant for Life—Bonâ fide Exercise of Power—Rights of Way over Park usually occupied with principal Mansion-house—Lease to Wife of Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *ss.* 6, 53, 54—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *s.* 10—12 & 13 *Vict.* c. 26.

The tenant for life of a settled estate, for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for twenty-one years of a house called *X.*, about three miles from the principal mansion-house on the *T.* estate, of which estate *X.* formed part, together with rights of way over all roads and drives which from time to time should exist on the *T.* estate. The drives then existing were about twenty-five miles long, and extended over the estate generally, including the park usually occupied with the mansion-house and up to the gate and door of such mansion-house. At the same time, and substantially as part of the same transaction, the tenant for life granted to his wife a building lease for ninety-nine years of a piece of land forming part of a portion of the *T.* estate never previously used as building ground, and inconvenient for such a purpose, together with the right of way over certain drives, including the carriage-drive over and up to *X.* Any house on the building site would overlook and destroy the privacy of *X.*

It was part of the arrangement that the two leases should be renewed every few years, so as to ensure that, so far as possible, the terms should begin to run from the death of the tenant for life.

In May, 1891, the two leases were renewed on the same terms. Neither the old nor the new leases were substantially acted on during the life of the tenant for life. After the death of the tenant for life the lessees brought an action to have the validity of the leases established:—

Held, (1.) that the leases were invalid, because they were not granted in the *bonâ fide* exercise of the leasing powers of the tenant for life having "regard to the interests of all parties entitled under the settlement" within the meaning of sect. 53 of the *Settled Land Act*, 1882; (2.) that, having regard to sect. 6 of the *Settled Land Act*, 1882, and sect. 10 of the *Settled Land Act*, 1890, the lease of *X.* was invalid by reason of its granting rights of way over the park and lands usually occupied with the principal mansion-house; and (3.) that the lease of *X.* could not be regarded as a valid contract for a lease without the rights of way under 12 & 13 Vict. c. 26.

Semble, that a tenant for life may grant a lease to a married woman although she is his own wife.

AT the dates of the leases mentioned below, the hereditaments thereby respectively demised, together with other large estates

ROMER, J
1898
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

in the county of *Stafford* (including the hereditaments affected by or made subject to the easements or rights granted or demised by the same leases) stood limited, by virtue of certain indentures of settlement of the 4th of November, 1834, and the 21st of April, 1852, or one of them, and an indenture of resettlement dated the 20th of October, 1884, to the use of the late *George Granville William*, then Duke of *Sutherland* (since deceased), during his life, with remainder to the use of *Cromartie Sutherland Leveson-Gower*, the present Duke of *Sutherland*, then commonly known as the Marquess of *Stafford*, his eldest son, the Defendant in the action mentioned below, during his life, with divers remainders over.

By the resettlement of the 20th of October, 1884, it was declared that the powers of the *Settled Land Act*, 1882, in relation to the premises thereby settled should be extended or enlarged in manner therein expressed, to the intent that such extended or enlarged powers, and all provisions subsidiary or incidental to or connected with the same respectively, should operate and take effect, with all the like incidents, effects, and consequences, as if the same or the like powers, with the like incidental provisions, had been contained in the said Act, but subject to the provisions thereinafter contained; and, further, that all such extended and enlarged powers and incidental provisions should be exercisable and applicable by and to the lessor as tenant for life under the said settlements of 1834 and 1852, as well as by and to the person or persons in whom the statutory powers should from time to time be vested in or by virtue of the said resettlement of 1884. And it was thereby declared that the leasing powers of the said Act should be extended so as to authorize a grant of building leases, as defined by the said Act, of any of the hereditaments and premises thereby settled, for any term not exceeding 999 years, and it was thereby also agreed that no part of the rent arising under any mining lease, as defined by the said Act, of any hereditaments for the time being, subject to the uses or trusts of the said resettlement, should be set aside as capital money under the said Act or otherwise, but the whole thereof should go and be received and applied as rents and profits, and that all or any of the powers

conferred by the *Settled Land Act*, 1882, and any powers given by the said resettlement by way of extension or enlargement of the powers of the said Act, might be exercised in relation to any of the said premises, without the necessity in any case of giving notice of the intention to exercise the same to the trustees or trustee under the settlement thereby made, or their or his solicitor; and, further, that such dispensation from the necessity of giving any such notice should be applicable in the case of any exercise of any such powers by the lessor as tenant for life under the said settlements of 1834 and 1852.

The late Duke and his second wife *Mary Caroline*, now Dowager Duchess of *Sutherland*, the Plaintiff in the action mentioned below, were married in March, 1889, and shortly afterwards the late Duke applied to the Defendant to concur in an arrangement under which a house and lands called *Tittensor Chase* should be provided as a dower or jointure house for the Plaintiff; but such concurrence was refused.

In a letter from the late Duke to the Defendant, dated the 27th of May, 1889, the former said: "I am going to have a lease drawn up for twenty-one years of *Tittensor House* and surroundings for the Duchess, and also a building lease for ninety-nine years in another part of the common, in order that, should she survive me more than twenty-one years, she shall have a home to retire to."

On the 14th of August, 1889, the late Duke purported to grant to the Plaintiff leases identical in form with those granted on the 20th of May, 1891, and mentioned below, except as to the dates thereof and the time from which the terms were to commence, which was the 25th of March, 1889.

On or before the 20th of May, 1891, the Plaintiff surrendered the leases of the 14th of August, 1889, and the late Duke then purported to grant the two leases of that date, the effect of which is stated below.

By an indenture of lease, dated the 20th of May, 1891, and made between the late Duke of the one part and the Plaintiff of the other part, the late Duke, in exercise of the power given to him by the said resettlement of the 20th of October, 1884, and of every other power or authority enabling him in that behalf, demised to the Plaintiff all that messuage or dwelling-house

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND.

called *Tittensor Chase*, with the entrance-lodge, stables, coach-houses, buildings, outhouses, yards, pleasure-grounds, roads, and approaches thereto belonging or appertaining, and also all the lands and hereditaments which were more particularly described in the first schedule thereto, and delineated in the plan thereto annexed, and situate in the township of *Tittensor* and parish of *Stone*, in the county of *Stafford*, together with the appurtenances (except and always reserved to the lessor, his heirs and assigns, certain rights of way as therein mentioned). And also by way of further demise the right to a free supply of good water to be supplied from the reservoir shewn on the plan not exceeding 2000 gallons per diem, through the mains and pipes marked on the plan, and situate partly on other lands of the lessor and partly on the lands thereby demised, and also the free right of passing and repassing, whether on foot or on horseback, or in any private carriage or private vehicle, over and upon the roads and drives situate on that part of the lessor's estate which was called *Tittensor Common* (which roads and drives were also delineated on the plan), and over and upon all other roads and drives which from time to time should exist upon that part of the lessor's property which was known as the *Trentham* estate, and also all and singular the fixtures, furniture, and effects in and about the said messuage which belonged to the lessor and which were enumerated in the second schedule to the lease. To hold all the same premises to the Plaintiff, her executors, administrators, and assigns for the term of twenty-one years from the 25th of March, 1891, as her separate property and estate, at the rent of £250, and subject to the covenants by the Plaintiff and conditions by and in the same indenture reserved and contained. And in the same lease were contained a covenant by the Plaintiff for the payment of the said rent, and covenants by the Plaintiff for the repair of the dwelling-house and buildings, and a condition of re-entry on the rent not being paid within twenty-one days after any of the days thereby appointed for the payment thereof. And it was thereby agreed that the Plaintiff should not be impeachable for waste except voluntary or permissive waste involving the destruction of ornamental trees or shrubs, or buildings and furniture and fixtures.

By another indenture of lease bearing even date with and made between the same parties as the lease above stated, in consideration of the expenses to be incurred by the Plaintiff in the erection of the dwelling-house and premises thereinafter demised, and of the rent and covenants thereinafter reserved and contained and on the part of the Plaintiff to be paid and performed, the lessor, in exercise of the powers given to him by the indenture of the 20th of October, 1884, and of every or any other power enabling him in that behalf, demised to the Plaintiff a piece of land situate in the township of *Tittensor*, containing 5A. 11P. and 12Y. or thereabouts, together with the messuage or dwelling-house and other buildings to be erected on the said piece of land or on some part thereof, and together also with all rights, ways, and appurtenances to the same premises belonging, including a right to a free supply of water from the reservoir on the lessor's estate marked on the said plan, and with the right of access on foot and in carriages from the public high road leading from *Stone* to *Trentham*, passing through gates marked on the plan annexed to the lease, and also a right to pass on foot and on horseback and in private vehicles over certain roads or drives also marked on the plan, and also a right to connect the drains of the house and buildings to be erected on the land thereby demised with the sewer to be provided by the lessor at or near a point marked on the plan (except and reserving as therein mentioned). To hold to the Plaintiff for the term of ninety-nine years from the 25th of March, 1891, at the yearly rent for the first two years of a peppercorn if demanded, and during the remainder of the said term the rent of £100, and subject to the covenants and conditions in the same lease contained, including a covenant by the Plaintiff that she would within five years from the date of the indenture now in statement erect and complete on the said piece of land thereby demised one messuage or dwelling-house, necessary outbuildings, walls, drains, and appurtenances thereto, suitable for a private residence fit for habitation and occupation, in a proper workmanlike manner, of the yearly value of £100 at the least, and a covenant by the Plaintiff for the payment of the rent thereby reserved. And in the same lease was contained a condition of

ROMER, J
1893
DOWAGER DUCHESS OF SUTHERLAND v DUKE OF SUTHERLAND.

re-entry on the rent being unpaid for the space of thirty days after any of the days on which the same ought to be paid as therein mentioned.

On the execution of the two leases of 1891, the leases of 1889 were left in the muniment room at *Trentham Hall.*

Tittensor Chase was about three miles from *Trentham Hall*, the principal mansion-house on the *Trentham* estate. *Tittensor Chase* comprised about thirty-eight acres of land, and both this property and the building site formed part of the *Trentham* estate, one of the principal residential estates of the Dukes of *Sutherland.*

The total acreage of the *Trentham* estate was about 13,000 acres, the park surrounding the house containing over 700 acres.

The drives mentioned in the lease of *Tittensor Chase* extended over the estate, including the park, were over twenty-five miles in length, and extended up to the gate and door of *Trentham Hall.*

The drives were kept private by a number of gates that were locked, and could be opened by one key; and the drives were swept and kept in order by a number of men employed on the estate. The Dukes of *Sutherland* had for many years been in the habit of allowing a number of tenants and neighbours (about thirty in number) to walk and drive over the drives, and had allowed them to have keys to obtain access thereto. *Tittensor Chase* and the building site were parts of *Tittensor Common*, which had been enclosed many years before under an Act of Parliament. The common was subsequently planted, and intersected by private drives. No previous building lease had been granted of any part of it. The land included in the building lease was close to and overlooked *Tittensor Chase*, so that any house erected on the building site would interfere with the privacy of *Tittensor Chase.* The building site was on such a slope that any house on it could only be built by means of terraces. No road to the site existed or had been staked out, and the drives mentioned in the lease of it included the private drives of *Tittensor Common*, and the carriage-drive through the entrance-lodges over the private ground of *Tittensor Chase*, and up to the house itself. The building site itself had not been staked out, nor had any building been commenced on it.

The circumstances attending the execution of the two leases of the 14th of August, 1889, were as follows: On the late Duke hearing that the Defendant had refused his assent to the proposal as to *Tittensor Chase*, he said to his agent, Mr. *Menzies*, "Then I shall grant a lease." Shortly afterwards, on the 29th of May, 1889, the late Duke wrote to Mr. *Menzies* that he would receive a proposed lease of *Tittensor House*; that he was to read it, make his remarks in the margin, and return it to Mr. *E. B. Michell*, who was the Plaintiff's brother, and was a member of the Bar. Then followed a letter from Mr. *Michell*, enclosing the draft lease, and containing the following passage: "The Duke wishes access to be given to all drives on the *Trentham* estate, and suggested also that a key should be given to the lessee." Mr. *Menzies* told the late Duke that the provisions as to the drives in the lease of *Tittensor Chase* would interfere with the privacy of the *Trentham* estate; that any successor in title would probably object to it; that he was sure it would lead to litigation; and that he thought it was illegal. The late Duke said there was not much in the objection; that if the present hostility continued it might be so; but that he hoped Lord *Stafford's* feelings on the subject would change. At a second interview, Mr. *Menzies* repeated his objection as to the drives, and the late Duke said, "Let it go for what it is worth."

On the 1st of June, 1889, Mr. *Menzies* wrote to Mr. *Michell* acknowledging the receipt of the draft lease, which was returned with the letter, and saying: "You will see what I have said as to the *Trentham* estate drives and roads. I think this would be a very doubtful gain." Mr. *Menzies'* note on the draft lease of *Tittensor Chase* was as follows: "Right to use roads and drives on *Trentham* estate. This appears to me to open questions of extreme importance; but I will only say now that its first effect would be to increase the rent to be reserved most materially. If his Grace has not absolutely determined upon this I would venture to advise that the leave-rights be restricted to the original proposal, *Tittensor Common* itself, yielding and paying £200."

On the same day there was a letter from Mr. *Michell* to Mr. *Menzies*, enclosing a draft building lease of a site of part

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v DUKE OF SUTHERLAND.

of *Tittensor Common*, which he had prepared for the latter's approval; and further correspondence with regard to it ensued. On the 14th of July, 1889, the late Duke wrote to Mr. *Menzies* to attend a meeting at *Stafford House*, at which the late Duke's solicitor and Mr. *Michell* were to be present, and stating that he was "anxious to get these leases settled."

In answer to a letter from Lord *Stafford* making certain suggestions as to *Tittensor Chase*, the late Duke, in a letter dated the 20th of July, 1889, said he preferred his own way, "to let the Duchess pay a just rent, and of course it is my duty to see the rent is provided for." Referring to Lord *Stafford's* leaving *Tittensor Chase* if the lease was granted, the late Duke expressed his regret at this, and wrote: "I suppose I should most likely let it, and furnish it from *Stafford House*, *Trentham*, and *Dunrobin*."

On the 30th of July, 1889, Mr. *Michell* sent the leases, executed and post-dated the 14th of August, 1889, to Mr. *Menzies*. A letter of the 30th of July, 1889, which accompanied them, contained the following words: "The leases are now executed, and will, I suppose, be left at *Trentham*. A counterpart should be made by taking a copy on paper, and after that counterpart is executed by the Duchess it could be kept amongst the Duke's papers, and the one now executed could be kept among the Duchess's papers. Please fill in the dates conformably." A postscript was as follows: "Please attach the open map, which his Grace is sending, to the counterpart. I have noted on the envelope of the deeds that they should be renewed from time to time." This note was as follows: "*Tittensor* leases. Note.—The building lease ought to be re-executed on a fresh paper or parchment, with altered dates, at least every two years, and the other lease at least once every four years.—*E. B. M.*"

Mr. *Menzies* called the late Duke's attention to the postscript to Mr. *Michell's* letter, and asked him what was the meaning of it. He replied: "It is to obviate what the lawyers call a waste of the term."

There was also documentary evidence that the late Duke contemplated renewals, at any rate, of the lease of *Tittensor Chase*.

In May, 1892, Messrs. *Walton & Lee*, estate agents in *London*,

by direction of the late Duke, put *Tittensor Chase* on their books for a short time as "to let," and withdrew it after a week or so.

No rent was ever paid by the Plaintiff, and no real possession of the property comprised in either lease was ever taken by her in the late Duke's lifetime.

The late Duke of *Sutherland* died in September, 1892, and shortly afterwards the Defendant took possession of the property comprised in the leases.

The Plaintiff thereupon commenced an action for an injunction to restrain the Defendant, his servants and agents, from entering or continuing or otherwise trespassing upon or interfering with the Plaintiff's possession and enjoyment of a house called *Tittensor Chase* and the lands comprised in the leases, and from interfering with the user and enjoyment by the Plaintiff and persons authorized by her of the rights, liberties, and easements of such leases granted or demised, and in the alternative to recover possession of the hereditaments.

By his statement of defence the Defendant alleged that the leases of the 20th of May, 1891, were invalid and void against the Defendant, and that neither of them was duly granted in accordance with the powers given or preserved by the settlement of the 20th of October, 1884, and the *Settled Land Acts*; that the leases were not made in a *bonâ fide* exercise of the powers of leasing, but in fraud of the power, and with the intent and object of giving the Plaintiff a jointure-house on the settled estate, and that in granting them the late Duke did not regard the interests of the remaindermen, but only the interests of the Plaintiff, and that she had not dealt in good faith for the leases, but sought to acquire a jointure-house upon the settled estate. The statement of defence also alleged that the Plaintiff and the late Duke "formed a plan for the Duke to grant to the Plaintiff" the leases above mentioned, "which leases were to be renewed from time to time, so that the leases should have as long a term as possible from the death of the late Duke, and so that the Plaintiff from his death might during her whole life be able to reside on the settled estate, and the piece of land was selected by the Plaintiff and the late Duke, and is in such a position that the Plaintiff could by building on it destroy the amenity of *Tittensor Chase*,"

ROMER, J
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

and that "the leases were intended and did in effect operate as leases to take effect in reversion expectant on the death of the late Duke, and not as leases in possession."

Paragraphs 8, 9, and 10 of the defence were as follows:—

"8. The Plaintiff never entered into possession of any part of the property comprised in the said leases of the 14th of August, 1889, and the said leases of the 20th of May, 1891, nor paid any rent thereunder; but the late Duke remained in possession of the property down to the time of his death, and the Defendant is now in possession thereof."

"9. The aforesaid leases are prejudicial to the settled estate, and contain grants of rights of way and other easements which would never have been granted to a stranger, and no such rights are given by any other lease upon the whole settled estate, and such rights were granted solely on account of the Plaintiff being the wife of the lessor, and the granting of such leases was made without any regard to the interest of the Defendant, and the late Duke committed a breach of trust in granting the same, and the Plaintiff took such leases with notice thereof, and the same are invalid.

"10. The lease" of *Tittensor Chase* "was the lease of a furnished house with very extensive rights and easements, and the rent thereby reserved was not the best rent that could be reasonably obtained for the same, and the late Duke had no power to grant a lease of part of the settled property together with property which belonged to himself or the Plaintiff at one rent. The rights of way thereby granted over and upon all roads and drives which from time to time should exist upon that part of the property which was known as the *Trentham* estate was a grant of rights over the pleasure-grounds, park, and lands usually occupied with *Trentham Hall*, the principal mansion-house on the settled estate, and the lease containing such grant was made without the consent of the trustees of the settlement or an order of the Court, and is invalid."

Par. 11 alleged that the best rent had not been reserved by the building lease, and par. 12 was as follows:—

"12. The late Duke had no power to grant either of the said

leases to his wife, the Plaintiff; and the Plaintiff, being a married woman, could not, and did not, covenant to pay the rent reserved by the said leases respectively, and both of such leases are invalid."

The action was tried before Mr. Justice *Romer* on the 9th, 10th, 12th, and 13th of June.

Sir *E. Clarke*, Q.C. (*Haldane*, Q.C., and *J. G. Wood* with him), for the Plaintiff:—

The execution of the leases is not denied by the Defendant. The Plaintiff has therefore a *primâ facie* case resting on the documents, and the *onus* lies on the Defendant to shew the leases are bad.

Sir *H. Davey*, Q.C. (Sir *H. James*, Q.C., *S. Hall*, Q.C., and *Jason Smith*, with him), for the Defendant:—

There is no objection to the Defendant's case being now opened; but no *primâ facie* case for the Plaintiff has been shewn, for the leases are on the face of them not within the power. The late Duke was only tenant for life, and had no estate to convey. His leases can only be valid if they comply strictly with his powers of leasing, and are in accordance with the *Settled Land Act*, 1882. Sect. 6 of the Act enables a tenant for life to lease the settled land or any part thereof, or any right or privilege of any kind over or in relation to the same, for not exceeding, in the case of a building lease, ninety-nine years, in the case of a mining lease, sixty years, and in the case of any other lease, twenty-one years. By sect. 7, every lease is to be by deed, and to take effect in possession not later than twelve months after its date; it must reserve the best rent, and contain a covenant by the lessee for payment of the rent. Sect. 8 contains the regulations to be observed on granting a building lease. Sect. 15 contained restrictions as to leasing the principal mansion-house, park, "and the demesnes thereof, and other lands usually occupied therewith"; but this section is repealed by sect. 10 of the *Settled Land Act*, 1890, sub-sect. 2 of which is as follows: "Notwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure-

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court." Then, sect. 53 of the *Settled Land Act*, 1882, provides that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Dealing, first, with the lease of *Tittensor Chase*—though most of the objections apply to both leases—that lease was not a *bonâ fide* exercise of the power or in the general interest of the estate, but was made to provide a dower or jointure-house for the Plaintiff. In other words, the lease was a fraud on the power. A second point is that this lease is invalidated by comprising property not settled as well as property forming part of the settled estate, so that an apportionment of the rent would be necessary before any successor in title of the lessor could obtain any payment of rent. The third point is that there is no covenant by the Plaintiff, because, under the *Married Women's Property Act*, 1882, a married woman cannot covenant, but can only charge her separate estate. Her covenant would not bind her property after she had become discovert. A fourth objection to the lease is that the leasing power was exercised over the pleasure-grounds of *Trentham House*; and a fifth point, one of evidence, is that the best rent has not been reserved as required by the *Settled Land Act*. There is a separate objection with regard to the building lease—viz., that it was not a *bonâ fide* building lease, being made for the purpose of providing the Plaintiff with a house if she survived the twenty-one years' term of *Tittensor Chase*; and, moreover, that it is a prejudicial lease and not for the advantage of the estate. Without suggesting sinister motives, it is prejudicial to and almost destructive of the enjoyment of *Tittensor Chase*. Moreover, there has been a collateral contract for re-execution of both leases so as to secure the full statutory term, if possible, from the death of the late Duke.

Dealing with the first point, it is clear on the *Settled Land Act*, 1882, as judicially construed, that the late Duke was in the

position of a trustee in exercising the power, and that as a tenant for life he was not entitled to be generous at the expense of the estate: *In re Chawner's Settled Estates* (1); *Hampden* v *Earl of Buckinghamshire* (2). A tenant for life cannot sell to himself, neither can he execute a lease of this kind to himself. Sect. 12 of the *Settled Land Act*, 1890, although it contemplates a tenant for life purchasing, in that case takes away the power of sale from him and gives it to the trustee of the settlement. It is perhaps significant that this section is not extended to leases. Irrespective of the *Settled Land Acts*, a tenant for life exercising a leasing power is a trustee and cannot lease to his wife. *Doe* v. *Gilbert* (3) decided the converse case, that a wife with a leasing power could not lease to her husband; and that case was decided on a ground which equally applies to a lease by a husband to his wife. There can be no real bargaining between two people who are one in law, that one person being the husband. In the case cited there was no objection that the best rent had not been given, the only point being that of husband and wife. But what was here intended was not to benefit the settled estates, but to confer a benefit on a stranger, or rather on one in whom the person exercising the power had a friendly or affectionate interest. The very fact that the late Duke wanted to give the legal right of driving over the *Trentham* estate shews that the lease was not made in the interest of the estate. The Plaintiff's counsel admit that no such rights would have been given to a stranger. In the part which Mr. *Michell* took with regard to the leases, he was acting as agent for both the late Duke and the Plaintiff. There was a collateral agreement that the leases should be renewed from time to time, and the reason for re-executing the leases was that whenever the late Duke died the Duchess should have as long a term as possible under each lease. No doubt a power of surrender is given by the Act of 1882, but it is subject to sect. 53, and must be exercised in the interest of the settled estate.

If any such collateral agreement had been made with any ordinary tenant, the effect would have been to destroy the lease,

(1) [1892] 2 Ch. 192. (2) 37 Sol. J. 455; since reported [1893] 2 Ch. 531.
(3) 5 Q. B. 423.

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

as it would have been an attempt to extend the term, not in the interest of the estate, but to benefit the intended lessee. It is true the leases of 1889 are not existing leases, but the present leases were given partly in consideration of the surrender of the original leases. A trustee, as the late Duke was, could not make an antecedent bargain to renew from time to time. Every power must be exercised with the exclusive view of benefiting the estate. There is plain and most cogent evidence of what was the intention of the parties in the transaction now impeached. It is impossible to contend that if the Duke had been an actual and not a statutory trustee, the old leases could stand. And the new leases based on the surrender of the old are invalid.

The lease was not made to take effect in possession. Lord *Stafford* remained in possession till May, 1890, and after he had left, no separate possession was ever taken by the Plaintiff.

The Plaintiff's counsel will attempt to justify the new leases by sect. 13 of the *Settled Land Act*, 1882, which empowers a tenant for life to accept, with or without consideration, a surrender of any lease of settled land and to make a new lease. The new leases were granted in pursuance of the collateral agreement and for the surrender of the old ones; but the only effect of the new building lease was to increase the time for payment of a peppercorn rent, and to lessen by some months the period for which the pecuniary rent was payable. If the late Duke had lived, the leases would again have been renewed from time to time.

All the circumstances point to the inference that the lease of *Tittensor Chase* was not granted in pursuance of the powers under the *Settled Land Act*, and shew that it is inconsistent with the obligations imposed by that Act and by the general law. The lease of the 20th of May, 1891, is a lease of the house and furniture. On the face of it it cannot stand because it purports to demise by one document both settled land and chattels, not settled, of a substantial character at one rent. Lord *Stafford*, after his father's death, would be entitled to the rent of the settled property; but some one else would be entitled to the rent of the unsettled furniture, and this can only be ascertained by apportionment. How can it be said the best rent was given for

the house when one does not know the amount of it? If authority is needed, the Court of Appeal has decided that trustees have no power to grant such a lease: *Tolson* v. *Sheard* (1). It would need a litigation, or, at the least, an arbitration or valuation, before Lord *Stafford* or any other successor in title could recover the rent. The old feudal law no doubt allowed the rent to be recovered from the land; but the Court of Exchequer was not ignorant of this when it decided, in *Salmon* v. *Matthews* (2), that the rent of a house and furniture might be apportioned in the case of a lease of a furnished house. It is immaterial whether the furniture was the property of the late Duke or of the Plaintiff at the date of the lease. On the face of the deed the rent includes compensation for the use of the scheduled furniture. The same apportionment would be required in case of proceedings against an assignee.

[He also referred on this point to *Sugden* on Powers (3); *Doe* v. *Stephens* (4).]

[Sir *E. Clarke*, in answer to a question by Mr. Justice *Romer*, said the Plaintiff would be willing to pay the same rent if the lease were held good as to *Tittensor Chase* alone.]

That assent is fatal to the Plaintiff's case. It would be a new lease at a new rent; but the real question is whether the lease when granted was void.

[ROMER, J.:—Is it clear that in such a case the lease is absolutely void?]

It seems so. It is some evidence that the best rent was not given; but, independently of that, it is attempting to make a new contract, which would require a new consensus of minds.

There is another fatal objection on the face of the deed. Sect. 7, sub-sect. 3, of the *Settled Land Act*, 1882, requires a covenant by the lessee to pay the rent; but the Plaintiff, though purporting to covenant, was then a married woman. Prior to the *Married Women's Property Act*, 1882, she could only charge her separate property then existing. By the Act, as judicially construed, she could only charge her future separate estate if she

(1) 5 Ch. D. 19.
(2) 8 M. & W. 827.
(3) 8th Ed. pp. 809, 810.
(4) 6 Q. B. 208.

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND.

then had some separate estate. But the *Settled Land Act*, 1882, requires a covenant which is binding and can be enforced by execution, and not a mere charge on property which may be disposed of by the covenantor during the coverture, which would be the effect of such a covenant as this: *Pike* v. *Fitzgibbon* (1). Moreover, it is doubtful whether the covenant would run with the land.

[ROMER, J.:—Would not a lease to a married woman by an owner in fee be valid? Would not her covenant run with the land?]

The covenant could only charge her separate property, and would not bind her assigns: *Married Women's Property Act*, 1882, s. 1, sub-ss. 2, 4; *Pelton Brothers* v. *Harrison* (2).

There is also another objection to the lease of *Tittensor Chase*. If this lease stood, it would be in the power of the Plaintiff to drive over all the drives on the *Trentham* estate, including the principal drive; but to grant a lease of such an easement is in contravention of sect. 10, sub-sect. 2, of the *Settled Land Act*, 1890. If a strict construction were put on the words of the clause, there would be no invalidity unless the lease purported to demise the whole of the mansion-house, and the park and lands usually occupied therewith. It is necessary, therefore, to import the words "or any part thereof." The true meaning is that the mansion-house and park are excluded from the leasing powers: sect. 2, sub-sect. 10, of 1882. It is more prejudicial to let a right of way like this, which may be used at any time during the shooting season, or at a time of entertainment, than merely to let the paddock, which would clearly be in contravention of the Act. The lease is absolutely void on this ground, and also on the ground that the best rent has not been reserved, which is a question of evidence. The building lease was granted, not for the benefit of the estate, but for the Plaintiff's benefit, in case she survived the twenty-one years thus granted by the lease of *Tittensor Chase*.

Sir *E. Clarke*, Q.C., and *Haldane*, Q.C., for the Plaintiff:—

It is immaterial what the motive of the late Duke was in

(1) 17 Ch. D. 454. (2) [1891] 2 Q. B. 422.

granting the leases; at any rate, no such motive has been shewn as will invalidate the leases: *Farwell* on Powers (1); *Topham* v. *Duke of Portland* (2). There was no want of *bona fides* in either the Duke or the Plaintiff. It was not unreasonable for the former to wish that his widow should enjoy the drives she had enjoyed with him; and the latter dealt in good faith for the leases within the meaning of sect. 54 of the *Settled Land Act*, 1882. Sir *Horace Davey* is not addressing a Court governed exclusively by the rules laid down in the time of *Meeson* and *Welsby*. There is ample authority that even an express covenant for renewal does not make a lease void, though the lessor on renewing must see that he then gets the proper rent; the covenant to renew binds the covenantor during his life: *Doe* v. *Bettison* (3); *Gas Light and Coke Company* v. *Towse* (4). A short time only had elapsed when the leases were renewed, and the Duke was then entitled to act on the advice which he had only shortly before received. The only effect of the covenant to renew was that on a future occasion the lessor would re-exercise the power.

Sect. 1 of the *Married Women's Property Act*, 1882, clearly contemplates such a covenant as this being binding on a married woman having separate estate. It was passod to enable married women to make contracts of this kind. It does not cut down her power to take leases. Before the Act she had power to do so: *Platt* on Leases (5); and it binds her separate estate: *Gaston* v. *Frankum* (6). This case was reversed on appeal, but not on this point (7).

It has been said that these were leases to the tenant for life himself, and the Defendant relies on sect. 12 of the *Settled Land Act*, 1890, which provides that in the case of a sale to the tenant for life, the trustees are to stand in the place and exercise the powers of the tenant for life; but there is authority that a tenant for life with a power of leasing can lease to himself: *Farwell* on Powers (8); *Wilson* v. *Sewell* (9); *Earl of Cardigan* v.

(1) 2nd Ed. pp. 413, 428.
(2) Law Rep. 5 Ch. 40.
(3) 12 East, 305, 310.
(4) 35 Ch. D. 519.
(5) Vol. i. p. 531.
(6) 2 De G. & Sm. 561.
(7) 16 Jur. 507.
(8) 2nd Ed. p. 564.
(9) 4 Burr. 1975.

ROMER, J
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND.

Montague (1); *Taylor* v. *Horde* (2); *Bevan* v. *Habgood* (3). The *Settled Land Acts* do not deal with this point. Since the *Married Women's Property Act* a married woman can take a lease from her husband. The power of husband and wife to sue each other was settled in *In re Lady Hastings* (4). There is no rule of equity which prevents a tenant for life leasing two properties together if it is beneficial to the settled property to do so: *In re Cooper & Allen's Contract* (5). In *Tolson* v. *Sheard* (6), there was only a single shaft wherewith to work minerals under two different estates; and that case is not an authority that in no case can a lease of two estates belonging in reversion to different persons be granted. *Salmon* v. *Matthews* (7) requires consideration; but there is no other authority to the same effect. Where a house is let with furniture at one entire rent, the rent issues out of the house and land, and not out of the furniture, and there is no need to apportion the rent: *Newman* v. *Anderton* (8); *Gilbert* on Rents (9); *Davidson's* Conveyancing (10); *Wms. Saunders* (11). So long as the Plaintiff is content to pay the whole rent to the present owner of the settled land, how can the inclusion of the furniture affect the validity of the lease? With respect to the driving rights, the rent is apportionable: *Sugden* on Powers (12). The Plaintiff, however, does not wish to rely on this part of the lease, but will pay the entire rent for the *Chase*. On such terms the Court will, on the authority of *Tollet* v. *Tollet* (13)—for the Plaintiff was both a wife and a purchaser—aid the defective execution of the power, or will do the same thing under 12 & 13 Vict. c. 26. But the Duke had power to grant the driving rights. Under sect. 6 of the *Settled Land Act*, 1882, standing alone, that would have been clear. Sect. 15 of the Act has been repealed by the Act of 1890, sect. 10, and the joint effect of the two provisions is to enable the drives to be demised.

[They also referred, on the question whether the best rent had

(1) *Sugden* on Powers, 8th Ed. App. p. 918.
(2) 1 Burr. 60.
(3) 1 J. & H. 222.
(4) 35 Ch. D. 94.
(5) 4 Ch. D. 802, 815.
(6) 5 Ch. D. 19.
(7) 8 M & W. 827.
(8) 2 Bos. & P. (N.R.) 224.
(9) Ed. of 1758, p. 175.
(10) 2nd Ed. vol. ii. p. 28.
(11) Ed. of 1871, vol. ii. p. 699.
(12) 8th Ed. p. 807.
(13) 2 P. Wms. 489.

been reserved, to *Farwell* on Powers (1); *Dyas* v. *Cruise* (2); and, on the question whether a fraud on the power had been committed, to *In re Marsden's Trust* (3).]

S. Hall replied for the Defendant.

1893. June 21. ROMER, J.:—

In my judgment, the leases, the subject of this action, cannot stand. I come to this conclusion on the broad ground that the late Duke, in granting them in exercise of his powers as tenant for life of the settled property (the *Trentham* estate), did not have regard to the interests of all parties entitled under the settlement, and acted in breach of the obligations which were cast upon him by sect. 53 of the *Settled Land Act*, 1882—that in relation to the exercise of his powers he should be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. In my judgment, those leases were not granted by the late Duke in the *bonâ fide* exercise of his leasing powers for the benefit of the settled estate, but were granted for the purpose of conferring, as they did confer, a benefit upon his wife, the Plaintiff, at the expense or to the serious injury of those who were to come after him, under the settlement, in the enjoyment of the estate.

The leases are two, bearing the same date, the 20th of May, 1891, and were executed at the same time, and substantially as part of one transaction. The one is a lease of a house and premises, and about thirty-eight acres of land, known as *Tittensor Chase*, and the furniture there, for twenty-one years from the 25th of March, 1891, at a yearly rent of £250. The other is a building lease of a piece of land a little over five acres in extent, for ninety-nine years from the 25th of March, 1891, at the yearly rent of a peppercorn for the first two years and of £100 for the remainder of the term, the Plaintiff covenanting to build a house on the site within five years from the date of the lease. This piece of land and *Tittensor Chase* form part of the well-known *Trentham* estate, one of the chief residential estates of the Dukes of *Sutherland*. The *Trentham* estate is one of

(1) 2nd Ed. p. 614. (2) 2 J. & Lat. 460, 482. (3) 28 L. J. (Ch.) 906.

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v DUKE OF SUTHERLAND

considerable beauty and extent, the park alone, surrounding the house, containing over 700 acres, and the total acreage being about 13,000 acres. One of the great charms and advantages of *Trentham* as a residential estate is its extensive private drives of over twenty-five miles in length. These drives are kept private by numerous gates, that are locked and can be opened by one key, and are swept and kept in repair by a large staff of men employed on the estate. Now, the lease of *Tittensor Chase* not only granted those premises to the Plaintiff, but also granted to the Plaintiff, her executors, administrators, and assigns, for the whole term, a right of way, on foot, or on horseback, or in any private vehicle, over all roads and drives which from time to time should exist on the *Trentham* estate, and contained a covenant by the late Duke that he, his heirs and assigns, would not obstruct the lessee, her executors, administrators, or assigns in the exercise of this right of way, and, if the access to any of the roads and drives should be obstructed by any gate, would supply the Plaintiff, her executors, administrators, and assigns with a key thereof. It is obvious that such a right of way as this must seriously interfere with the amenities of the *Trentham* estate and the management and enjoyment thereof by the present Duke, and cause annoyance and injury wholly uncompensated for by the rent reserved by the lease. These private drives exist over the estate generally, and in particular over the park usually occupied with *Trentham Hall*, the principal mansion-house, and extend up to the very gate and door of *Trentham Hall* itself. If this lease stands, the owner for the time being of *Trentham* could never stop, as against the lessee for the time being, any private drive whatever, however necessary or advantageous it might be to do so for the full enjoyment of the estate, as, for instance, for the purpose of preserving game, shooting, and so forth. If it pleased the lessee to do so, she might use this right of way so as to seriously interfere with the privacy and quiet enjoyment of *Trentham Hall*, and cause the owner for the time being annoyance for which he would have no remedy or compensation. In answer to this it is suggested that the Plaintiff would only exercise the right in a way which would cause no annoyance or injury to the present Duke or other the owner of the

estate for the time being. But even if the Plaintiff were at present actuated by the most friendly feelings towards the Duke, as to which I say nothing, it is possible that her feelings might not always be friendly, and the Duke might find himself with an unfriendly tenant at *Tittensor* determined to use her or his right of way to the fullest extent. Moreover, the Plaintiff might sell the lease and the purchaser be one desirous of inducing the Duke to purchase a surrender of the right of way. Can any one doubt that the owner of a seat like *Trentham Hall*, seeing himself subject to such a right of way as this, would probably find it worth his while to give a considerable sum to free the estate from such a burden? I cannot help thinking that, from this point of view alone and as a speculation, the lease would have a substantial commercial value.

But, whether or not the lease would have an extra value from considerations of this class, I am satisfied, from the facts of the case, even apart from the expert evidence given before me, that the effect of the leases would be seriously to injure the value, even in a pecuniary sense, of *Trentham Hall* and its park, should it ever have to be sold or let during the continuance of the lease. Nor ought the Court merely to regard the pecuniary effect of the lease on *Trentham Hall*. Even if the objection that would naturally be made to a lease of this kind by the owner of *Trentham Hall* were sentimental only—and I do not think it is—it ought not to have been wholly disregarded by the late Duke in exercising his powers. In *In re Marquis of Ailesbury's Settled Estates* (1), in the Court of Appeal, it was pointed out that the expression in sect. 53 of the *Settled Land Act*, 1882, "have regard to the interests of all parties entitled under the settlement," meant not merely pecuniary interests, but wishes and sentimental feelings, and so on, with reference to the estate. (See Lord Justice *Lindley's* observations (2), and Lord Justice *Bowen's* observations (3).) And those observations were in no way dissented from when the case came before the House of Lords (4). The Plaintiff's counsel sought to minimise the

(1) [1892] 1 Ch. 506.
(2) Ibid. 536.
(3) Ibid. 541.
(4) *Lord Henry Bruce* v. *Marquess of Ailesbury*, [1892] A. C. 356

ROMER, J
1893
DOWAGER DUCHESS OF SUTHERLAND v DUKE OF SUTHERLAND

importance of this right of way by pointing out that the Dukes of *Sutherland* had been in the habit of allowing a limited number of their neighbours to enjoy the privilege of walking and driving over these roads and drives, and given them the keys of the gates for that purpose. But the difference between allowing a privilege of this kind, which could be withdrawn at any moment, and having the estate subject to a legal right that could not be interfered with, is too obvious to require much comment. A neighbour exercising the privilege would be sure not to use it at times inconvenient to the owner of the estate or so as to intrude on the privacy of those living at the hall and enjoying its grounds, for otherwise the privilege and the key would probably be immediately withdrawn.

The conclusion arrived at above as to the serious injury caused by this lease to *Trentham Hall*, and to the Defendant as owner of the estate, is supported by the evidence before me of witnesses expert in leasing and selling and in valuing estates. [His Lordship referred to the evidence, and continued:—]

Then, when I turn to the so-called building lease, which, as I have said, was executed at the same time and substantially as part of one transaction, it appears still more difficult to justify the action of the late Duke in the matter. *Tittensor Chase* and the land included in the building lease are part of *Tittensor Common*, which was enclosed many years ago under an Act of Parliament, and now form part of the *Trentham* estate. This common has been planted by the owners of *Trentham*, and now forms a beautifully-wooded district, intersected by private drives. It has never been laid out or dealt with as a building estate, and until the building lease in question no owner of *Trentham* appears to have contemplated granting a building lease of any part of it. The land or site included in this lease is close to *Tittensor Chase*, on an eminence above it, and overlooks and commands that residence, and if a house were erected on the site it would greatly tend to interfere with the privacy and enjoyment of *Tittensor Chase* and seriously diminish the value of that property. This is clear, not only from a consideration of the undisputed circumstances of the case, but from the balance of the evidence before me. The site was in other respects a

most extraordinary one to select to build upon. It is on a slope, and it would be difficult and expensive to build on it, as the land would have to be terraced. It is difficult of approach. There is no present road to it, nor has any been designed or staked out; indeed, the site itself has never been staked out, nor has any step been taken to build on it or to treat it as a building site.

The building lease, moreover, granted a right of way over the roads coloured yellow on the plan annexed to it, which include not only the private drives of *Tittensor Common*, but also the carriage-drive through the entrance-lodges, over the private ground of *Tittensor Chase*, and up to and by the very house itself. So that, if the lease stood, the owner of *Tittensor Chase* would find it subject to this injurious right of way for a term of ninety-nine years.

It is difficult to avoid the conclusion, from a consideration of this and the other circumstances to which I am about to call attention, that this building lease was only granted for the purpose, and that it would have the effect, of putting undue pressure upon the succeeding owners of the *Trentham* estate, and of assisting the late Duke and the Plaintiff to carry out a scheme to enable the Plaintiff to enjoy *Tittensor Chase* during the remainder of her life as a kind of jointure or dower house; a scheme which the late Duke had no power as tenant for life of the estate directly to carry out.

The circumstances under which these two leases were granted and the dealings with reference to them during the late Duke's life are significant and important. It is said the Court is not concerned with the motives of the late Duke and the Plaintiff in executing these leases. So far as mere motive is concerned, if the leases were legally justified by the late Duke's powers, this is no doubt correct; but in a case of this kind, and in considering whether leases have been granted in good faith and for the benefit of the estate, it may be, and in the present case is, of importance to see what were the circumstances under which the leases were made, and what were the objects and effect of the leases, and what was done under them during the grantor's life.

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

The leases came to be made under these circumstances. The late Duke desired that *Tittensor Chase* should be provided as a jointure-house for the Plaintiff, and applied to his son, the Defendant, the present Duke, for his consent, without which the late Duke could not accomplish his desire. The Defendant would not give his consent for reasons he pointed out to his father. Thereupon, in 1889, two leases were drawn up and executed which, except as to their date and the time from which the terms were to commence, which was the 25th of March, 1889, were identical in form with the leases now before me. It was part of the arrangement then come to that the leases should be renewed every few years so as to ensure that so far as possible the terms should begin to run as from the time of the late Duke's death. Accordingly, these leases were renewed in May, 1891, as a matter of course, and without any further consideration as to their terms or as to the propriety or expediency of taking a surrender of the old leases and granting the new, and, but for the late Duke's death in September, 1892, doubtless there would have been further renewals. In the meantime, prior to May, 1891, in no substantial manner were the old leases acted upon, nor were the new leases acted upon during the late Duke's life. As to the building leases, it is admitted that no possession under them of any kind was ever taken by the Plaintiff. Nothing whatever was done under them. No building of any kind was erected or commenced, or, so far as appears, contemplated. As to the leases of *Tittensor Chase*, no rent was ever paid, and though it is suggested, on behalf of the Plaintiff, that possession was taken by her under them, I am satisfied on the evidence that no real possession was taken. The house was kept up at the expense of the late Duke, and was occupied and dealt with by the late Duke and his wife during the existence of the leases substantially in the same way as the other country houses of the late Duke were occupied and dealt with by them. So far as I can see, they regarded both these and the building leases as mere documents intended only to have real operation and effect when the late Duke died. Certainly the contrary is not shewn by the curious circumstance that in May, 1892, the Duke instructed Messrs. *Walton & Lee*,

the well-known estate agents, to put for a short time *Tittensor Chase* on their books to let as a matter of form, and to withdraw it after a week or so.

I may further observe that in settling the rents and terms of these leases there was no bargaining or attempt at bargaining of any kind, nor indeed, from the relation of the parties and the circumstances of the case, could there have been any real bargaining. There was no real attempt to ascertain what rents and terms could be obtained for such leases if offered to persons other than the Plaintiff. The leases themselves were drafted by the Plaintiff's brother. How the rent reserved by the building lease came to be fixed does not appear. The rent reserved for *Tittensor Chase* was fixed by the late Duke's agent, who was aware of the wishes of the Duke, and was not in a position to be wholly independent or to represent the other persons interested under the settlement, though he undoubtedly acted with perfect honesty in the matter, and, indeed, I ought to mention to his credit, that he pointed out to the late Duke the wrong he would be doing to the estate in granting to the Plaintiff such a right as that mentioned above, and the litigation that would probably ensue, though the Duke paid no attention to his remonstrance. But the rent so fixed by him was, as appears from his evidence and his notes at the time on the draft of the lease, fixed only with reference to *Tittensor Chase* itself, without taking into consideration the value to a tenant of the right of way; and the result of the evidence before me is that for that right a substantial increase of rent could have been obtained from an ordinary lessee, though, no doubt, no rent could have been obtained at all corresponding to or compensating for the injury to the rest of the estate caused by the grant of such a right.

For these reasons, I think the leases cannot be supported, and I need scarcely observe that under the circumstances the Plaintiff cannot be regarded as "a person dealing in good faith with a tenant for life," within the meaning, and so as to obtain the benefit of, the provisions of sect. 54 of the *Settled Land Act*, 1882. She was not called as a witness before me, and was a party to the selection of the building site, and was, as I gather, party and

ROMER, J.
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

privy to all circumstances of the transaction which I have remarked upon, and, indeed, it appears from her affidavit made upon the motion in the action that she was aware of the real object and intent of the leases.

There is also another ground on which the lease of *Tittensor Chase* must be held invalid. It infringes the provisions of sect. 10 of the *Settled Land Act*, 1890, inasmuch as it purports to grant a right of way over the park and land usually occupied with the principal mansion-house. It was argued before me that sect. 10 applied, not to a lease of an easement over, but only to a lease of the mansion-house, park, and lands. But, in my judgment, though sect. 10 does not repeat the words in sect. 6 (the leasing section) of the Act of 1882, "or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same," it has the same operation and effect as if those words had been repeated. Sect. 10, which relates generally to sales, exchanges, and leases by the tenant for life, is intended to refer, and does in effect refer, compendiously to the powers of sale, exchange, and lease which are referred to in more detail in the Act of 1882, and in particular to all the kinds of leases mentioned in sect. 6 of that Act. It would, indeed, be absurd if a tenant for life could not, without the consent of the trustees of the settlement or an order of the Court, sell or lease the mansion-house, but could, nevertheless, without such consent or order, sell or lease a part of it or an easement over it.

But then it is said that this defect is curable by virtue of the provisions of the Act of 12 & 13 Vict. c. 26, and that the lease is to be regarded as a valid contract for a lease of *Tittensor Chase* without any right of way over the park and lands usually occupied with *Trentham Hall*. But, in my judgment, the Act does not, for several reasons, apply. Here (see the preamble of the Act) there was no mistake or inadvertence that I can see on the part of the late Duke, or ignorance of title on the part of the Plaintiff, nor (see sect. 2) was this lease made *bonâ fide*, nor do I think the lessee has entered thereunder. Moreover, I doubt whether the Act was intended to apply, or can apply, to a case like the present, where the lessee wishes to turn the invalid lease into a contract for a lease of premises substantially differing,

though only by omission, from the premises demised by the lease.

I also think the lease of *Tittensor Chase* was bad on another ground, namely, on the ground that it did not reserve the best rent that could be reasonably obtained, regard being had to the circumstances of the case, and because, as pointed out above, the Plaintiff cannot, in my opinion, protect herself under sect. 54 of the *Settled Land Act*, 1882. Now, I agree that the Court would be reluctant to allow a lease to be impeached merely on the ground of inadequacy of rent in a case where the lease was granted in good faith, and the terms were fairly arrived at in the usual way at the time the lease was granted between independent contracting parties. It has been said, that to upset a lease merely on the ground of inadequacy of rent, the rent reserved must be shewn to be extravagantly wrong, though with great respect, and speaking for myself alone, I think that is rather too strong a term to employ. Certainly, a Court would not interfere unless it was satisfied that the inadequacy was substantial. But in each case the particular circumstances must be regarded as a whole. It may well be that a lessor is quite justified in taking a rent from a good tenant substantially less than that offered by an inferior tenant, and so forth. But where the Court finds that the contracting parties are not independent, that the lessor, for example, is granting a lease to his wife, that there has been no bargaining of any kind, no attempt to obtain an independent tenant, and that the object of the lease, apart from the question of rent, was to benefit the wife, then, if the lease be impeached on the ground of inadequacy of rent, and the rent be proved to be substantially below what could reasonably be obtained in the open market, I think the lease ought not to be upheld. And that, in my opinion, is the case here. On the balance of the evidence before me, I think that the £250 rent reserved by the *Tittensor Chase* lease was very substantially below the best rent that could be reasonably obtained, even treating the £250 as reserved wholly for those premises and the right of way, apart from and without regard to the furniture.

[His Lordship commented on the evidence as to the annual value of the premises, and concluded as follows :—]

ROMER, J
1893
DOWAGER DUCHESS OF SUTHERLAND v. DUKE OF SUTHERLAND

The result I come to upon the whole is, that the rent reserved by this lease of £250 was, even disregarding the furniture, short of being the best rent that could reasonably be obtained by about £50 a year.

The above conclusions render it unnecessary for me to consider the other legal points raised by the Defendant's counsel as being fatal to the leases; but I think it right to add that I am by no means prepared to accede to the argument that the leases are bad of necessity, either on the ground that under the *Settled Land Act*, 1882, a tenant for life cannot lease to a married woman at all, or on the ground that he cannot lease under any terms or circumstances to his wife. The action is dismissed with costs.

Solicitors for Plaintiff: *Peacock & Goddard*, agents for *Dutton & Son, Newcastle-under-Lyme.*

Solicitors for Defendant: *R. S. Taylor, Son, & Humbert.*

F. E.

ROMER, J
1893
July 17, 18, 28

THORNE *v.* THORNE.

[1892 T. 1398.]

Executor—Assent to Legacy—Leaseholds—Mortgage to Building Society.

The mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specially out of or on account of the rents—is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to.

An executor is not entitled, on behalf of the estate, to take shares in a building society, or to make the estate liable for him as a shareholder therein; but a mortgage by an executor to a building society, though made to secure, not only money advanced and interest thereon, but all moneys becoming due from him as a shareholder, is not wholly void as against the beneficiaries, but is good to the extent of the money advanced and reasonable interest thereon, provided the advance was made in good faith to the executor in that capacity.

ROBERT THORNE, by his will dated the 25th of November, 1878, after directing that his debts and funeral and testamentary expenses should be paid by his executor thereinafter named as soon as conveniently might be after his decease, devised and

bequeathed his household furniture and sums of money in his house or due to him at his death, "and also my leasehold house situate at and being No. 162, *Boyson Road, Camberwell,*" and all other his real and personal estate and effects, unto his wife *Eleanor Thorne* during widowhood, and after her death or second marriage to his daughter *Eleanor Annie Emily Read* for her separate use. And the testator thereby appointed his son *Robert John Thorne* to be sole executor of his said will.

The testator died on the 25th of December, 1880, and his will was proved by *R. J. Thorne* on the 15th of January, 1881.

At the time of his death the testator was entitled to two leasehold houses, viz. 160, *Boyson Road,* which had been assigned to him on the 6th of March, 1880, and 162, *Boyson Road,* the house mentioned in his will, the latter being subject to a mortgage given by the testator on the 12th of December, 1879, to the *St. Martin's Mutual Benefit Building Society,* to secure £300.

With the exception of the above-mentioned mortgage debt all the testator's debts and funeral and testamentary expenses were paid, shortly after his death, by *R. J. Thorne.*

Between the date of the testator's death and the execution of the mortgages mentioned below, all the rents of the houses were received by *R. J. Thorne,* who did not hand them over to *Eleanor Thorne.* He made certain payments for her benefit out of the estate, but not specially out of or on account of the rents, and he made no representations on this subject to *Eleanor Thorne* or *E. A. E. Read.* He retained such of the title-deeds as were not already in the possession of mortgagees, and he also kept an account book relating to the testator's estate. This was entered up in the form of one continuous account, on the debit side of which he entered all cash received by him on behalf of the estate, whether from rents or sales, and on the credit side he entered all payments made by him on behalf of the estate, including those made for the benefit of *Eleanor Thorne.*

An indenture of mortgage dated the 21st of September, 1882, and made between *R. J. Thorne* of the one part, and the *Sun Permanent Benefit Building Society* of the other part, contained recitals of the original lease of No. 160, *Boyson Road,* and the

ROMER, J.
1893
THORNE
v
THORNE

assignment thereof to the testator, the appointment of *R. J. Thorne* as executor of the will of the testator, and the testator's death and the probate of his will, and also recitals as follows:—

"And whereas shares of the society are £10 each, and the mortgagor is a member thereof and subscriber for twenty shares therein numbered from 25514 to 25533, both inclusive, and the society has agreed to advance to the mortgagor £200 upon his giving such security as is hereinafter contained for the repayment of the said sum, and of the sum of £58 for interest thereon, during the term of six years, by seventy-two consecutive monthly instalments or subscriptions of £3 11*s.* 8*d.* each." And by the same deed *R. J. Thorne* covenanted to pay the society £258 by the instalments above mentioned, and to pay the society "all subscriptions, interest, fines, fees, and other moneys which, according to the rules for the time being of the society or these presents, shall from time to time become payable by the mortgagor to the society in respect of his said twenty shares, or of the said instalments and subscriptions or of the mortgaged premises," and also to "in all other respects observe and perform all the rules for the time being of the society." And *R. J. Thorne*, "as beneficial owner and by way of mortgage," conveyed No. 160, *Boyson Road*, to the society for the term of the lease less the last day thereof, subject to a proviso that upon full payment and satisfaction of all moneys thereby secured the society would at the mortgagor's cost indorse a proper receipt vacating the mortgage, or (if required) surrender the mortgaged premises to him or as he should direct. The deed also contained a declaration that the mortgagor should not be entitled to redeem the mortgage without paying all moneys due to the society under every other mortgage made by him, or by any other person through whom he claimed, on any other property, and should not be entitled to redeem any such other mortgage without paying all moneys due on this mortgage.

The advance proposal made by *R. J. Thorne* prior to this mortgage stated the "name of present owner" of the property proposed to be mortgaged as "sole executor and trustee, *R. J. Thorne*."

The rules of the society provided (rule 27) that advanced

shares should be those upon which the society advanced £10 per share; (rule 81) that the mortgage should be a security for the total amount of subscriptions, which included an amount for interest in respect of the advance and of all fines under the rules, and that in case of the mortgagor's failure for three months to perform the covenants the directors might serve him with a notice to pay all money then due with interest at 7½ per cent., and also the amount of all the then future subscriptions in respect of the mortgaged property, or the shares in respect of which the advance was made up to the end of the term for which the advance was originally made, subject to a rebate of two-thirds of so much of the future subscriptions as represented interest, and thereupon the society was to be entitled to recover the total amount in respect of which notice had been given and interest as aforesaid; (rule 83) that a member executing a mortgage to the society should be bound by and be subject to the rules, and all alterations and amendments thereof, although the intent or meaning of the same, or any part of them, might not be fully set forth or might be omitted in the said security.

By a deed dated the 23rd of December, 1882 (indorsed on the mortgage of the 21st of September, 1882), *R. J. Thorne*, who was therein stated to be the owner of fifteen £10 shares in the *Sun Building Society*, in addition to those referred to in the mortgage, charged No. 160, *Boyson Road*, with a further sum of £150.

By a deed dated the 6th of November, 1884, and made between the same parties, and in very similar terms, *R. J. Thorne* mortgaged No. 162, *Boyson Road*, to the *Sun Building Society* to secure £280, advanced in respect of twenty-eight other shares in the society, and £120 4*s*. for interest, the whole being repayable by 144 monthly instalments; by a deed of the same date these two sums were charged on No. 160, *Boyson Road*, by way of collateral security.

On the occasion of the last-mentioned advance, and as part of the arrangement, the mortgage to the *St. Martin's Society* was paid off, the usual statutory receipt, vacating that mortgage, being indorsed upon it and dated the 6th of November, 1884.

By a deed dated the 30th of June, 1887, *R. J. Thorne* charged

ROMER, J
1893
THORNE
v.
THORNE.

both properties with a further sum of £520 (alleged to be advanced in respect of fifty-two further shares in the *Sun Building Society*), and £284 for interest, the whole amount being repayable by 180 monthly instalments, and the provisions of the original mortgages to the society being applied to recovering and enforcing payment of the instalments, fines, and other moneys thereby secured as if they had been repeated in the further charge. No part of the £520 was, however, in fact advanced to *R. J. Thorne*, but was retained in payment of the aggregate amount due by *R. J. Thorne* to the society in respect of the previous securities.

R. J. Thorne subsequently absconded, and in July, 1892, *Eleanor Thorne* and *E. A. E. Read* commenced an action against him and the *Sun Society* for a declaration that their mortgages were invalid, and to have them cancelled. *R. J. Thorne* never entered an appearance or took any part in the proceedings. The action was tried before Mr. Justice *Romer* on the 17th and 18th of July, 1893.

Chadwyck Healey, Q.C., and *H. Terrell*, for the Plaintiffs:—

The rents were applied by the executor for the benefit of the tenant for life, and, in effect, paid to her, and under the circumstances, before any mortgage was executed by him, he assented to the legacy of the leaseholds, and by such assent the legal title was vested and must prevail over the mortgages. The assent may be either express or implied, and may be inferred either from direct expressions or particular acts: *Williams* on Executors (1). Payment of rent and charging it in account against the legatee of leaseholds is sufficient evidence of assent: *Doe* v. *Malberley* (2); and an assent to the gift of the life estate is an assent to the gift of the interest in remainder: *Stevenson* v. *Mayor of Liverpool* (3). The equity of the mortgagee cannot prevail over the legal title of the legatee: *In re Morgan* (4).

[They also referred on this point to *Thomlinson* v. *Smith* (5).]

Even if there was no assent, the executor was not justified in

(1) 8th Ed. p. 1380.
(2) 6 Car. & P. 126.
(3) Law Rep. 10 Q. B. 81.
(4) 18 Ch. D. 93.
(5) Finch, 378.

raising money by a mortgage in this form. The consolidation clause might be particularly oppressive to the beneficiaries. The deed and rules combined render it impossible to redeem except on onerous terms, and the mortgagor is made a shareholder and subjected to liabilities in respect of fines and otherwise which an executor cannot throw upon his testator's estate.

Neville, Q.C., and *Maidlow*, for the *Sun Building Society* :—

There is not sufficient evidence of the executor's assent to the legacy. He received the rents in his capacity of executor, and the accounts kept by him are of what was received and paid in respect of the estate as a whole. To hold that such facts as have been proved constituted an assent would be very dangerous, for in such a case no one would ever be safe in purchasing from an executor professing to sell or mortgage for payment of debts without the beneficiaries' concurrence. *Thorne* mortgaged as an executor for the purposes of the estate, and there is no doubt as to his power to do so, whether the property was generally or specifically bequeathed: *Williams* on Executors (1). The use of the words "as beneficial owner," in the mortgages was a mere matter of conveyancing, in order that mortgagors' covenants might be implied.

It is not now usual to require the concurrence of the legatee, for even if the executor did assent, he had power to sell for payment of debts, and the exercise of such power would override the legal estate. The effect of the statutory receipt on the mortgage to the *St. Martin's Society* was to vest the estate in the person who had the best right to call for it: *Hosking* v. *Smith* (2).

[They also referred to *In re Tanqueray-Willaume and Landau* (3); *Sugden's* Vendors and Purchasers (4).]

It is clearly within the power of an executor to effect a mortgage with a power of sale and with the incidents of a building society mortgage on advanced shares: *Cruikshank* v. *Duffin* (5). In many cases an executor would not be able to borrow money in any other way; and, in the present case, the testator himself

(1) 8th Ed. pp. 937, 938.
(2) 13 App. Cas. 582.
(3) 20 Ch. D. 465.
(4) 9th Ed. vol. ii. p. 56.
(5) Law Rep. 13 Eq. 555.

ROMER, J
1893
THORNE
v
THORNE.

had borrowed money on the security of a mortgage to a building society. The society was not bound to see to the application of the money lent, but was entitled to assume that the executor was lawfully raising it for the purposes of the testator's estate.

[ROMER, J.:—Does the society claim, as against the estate, more than the amount of the actual advances, with reasonable interest?]

The society will not press its claim for anything beyond that if the Plaintiffs are willing to redeem the property.

Chadwyck Healey, in reply, referred to *Bythewood and Jarman's* Conveyancing (1); *Davidson's* Conveyancing (2).

1893. July 28. ROMER, J.:—

The Plaintiffs contend that, after the testator's death and before the time of the first mortgage by the executor to the Defendant society, the executor had assented to the legacy of the mortgaged leaseholds to the Plaintiffs. But on the evidence before me I cannot come to that conclusion. During this time the Plaintiff, the widow *Eleanor Thorne*, was not allowed to receive, and did not receive, any part of the rents of the leaseholds. These rents were received by the executor, and, seeing that he was not a trustee of the leaseholds, this receipt by him is against the idea of his having assented to the legacy. Moreover, he kept the title-deeds. All he did that the Plaintiffs can rely upon at all was to make payments for the benefit of the widow. But he did not make these payments specially out of or on account of the rents. He made no representations on the point to the Plaintiffs or either of them. Nor does his book carry the matter further. What he did there was to put on one side, in one continuous account, all cash received by him on behalf of the estate, whether from the rents or from sales of the rest of the estate; and on the other side he put down all payments on behalf of the estate, including the payments for the widow's benefit. To hold that this is sufficient to establish an assent would be very dangerous. An executor often makes a general payment to or for the benefit of a widow, who is a

(1) 3rd Ed. vol. i. p. 185; vol. iii. p. 2. (2) 4th Ed. vol. ii. part ii. p. 468.

legatee under the will, in the hope and expectation that ultimately, when the estate is administered, she may prove entitled to the money paid and more, and yet he never intends thereby to bind himself to an assent to all the legacies which may be given to her by the will; and I do not think he ought to be held thereby so to bind himself.

This decision on the question of fact renders it unnecessary for me to consider what results would have followed had my decision been the other way.

The next point raised by the Plaintiffs is that an executor is not entitled to mortgage to a building society. Now, I agree that an executor is not entitled, on behalf of the estate, to take shares in a building society, or to make the estate liable for him as a shareholder. But granting this, and that the mortgage by the executor to a building society takes the form of a mortgage to secure, not only the money advanced and interest, but all moneys becoming due from him as shareholder, yet I do not think on this latter account the mortgage ought to be treated as wholly void in a case like the present, where the advance is made in good faith to the executor in that capacity, and the mortgage is not a colourable device for securing an advance to the executor in his personal capacity under guise of an advance to him in his representative capacity. I think that the mortgage is good to the extent of the money advanced and reasonable interest, although it will not bind the estate or the beneficiaries under the will (other than the executor himself, if he be a beneficiary), beyond that, so as to charge it or them with the executor's general liabilities or responsibilities as a shareholder. The mortgage by an executor is not void merely because he chooses to take upon himself in the mortgage personal liabilities which he cannot charge upon the estate, or merely because the mortgage contains provisions which are binding on the executor personally, but not binding on the estate—as, for instance, the provision in the mortgages before me as to the mortgagor not being entitled to redeem without paying all moneys due to the society under every other mortgage made by him, or by any person through whom he claims on any other property. As against the estate and the beneficiaries

ROMER, J
1893
THORNE v. THORNE

(other than the executor) the mortgage will be good to the extent it is authorized by the executor's powers as executor, and bad beyond. This was decided long ago by *Malins*, V.C., in *Cruikshank* v. *Duffin* (1). I therefore hold that, so far as this mortgage charges the leaseholds with the money actually advanced and reasonable interest, it is good, as the building society advanced this money in good faith to the executor in his representative capacity, and without notice that the executor was in any way acting improperly, or intending to deal improperly with the money advanced. This would lead me to a consideration of what in the present case would be reasonable interest, but for the building society offering to let the Plaintiffs redeem on paying the principal advanced and interest at 5 per cent., without fines or other charges. This offer is obviously a fair one, and is accepted by the Plaintiffs. There will, therefore, be the usual redemption judgment on this footing.

The costs of the Defendant society, of their defence and counter-claim, will be added to their security.

Solicitors for Plaintiffs: *Carthew & Wheeler*
Solicitors for Defendant society: *Digby & Liddle.*

(1) Law Rep. 13 Eq. 555.

F. E.

In re PORTSEA ISLAND BUILDING SOCIETY.

VAUGHAN WILLIAMS, J.

1893

May 19; *June* 21.

Company—Winding-up—Registered Building Society—County Court—Special Case—Jurisdiction—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 4, 32, *sub-s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 164—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 3, *sub-s.* 3—*County Court Rules*, 1892, *r.* 146.

In the winding-up in a county court of a building society registered under the *Building Societies Act*, 1874, a special case for the opinion of the High Court of Justice may be stated under sect. 3, sub-sect. 3, of the *Companies* (*Winding-up*) *Act*, 1890 :—

Semble, that the enactments from time to time in force, for the winding up of companies in the Chancery Division of the High Court, apply to the winding up of building societies in the county court, whether such enactments became law before or after the *Building Societies Act*, 1874 :

Semble, that sect. 164 of the *County Courts Act*, 1888, gives power to frame such rules only as regulate the practice of the county court.

ON the 20th of September, 1876, the *Portsea Island Building Society* was registered under the *Building Societies Act*, 1874.

On the 9th of January, 1892, the society passed a resolution requiring it to be wound up voluntarily, and appointed *William Edmonds* liquidator thereof; and on the 21st of January, 1892, the Judge of the county court of *Hampshire*, holden at *Portsmouth*, ordered the society to be wound up voluntarily under the supervision of the Court, and appointed *W. F. J. Hunt* an additional liquidator, to act with *W. Edmonds* as liquidator.

On the 11th of May, 1893, the county court Judge, at the desire of the liquidator, stated a special case "for the determination, in the first instance in the High Court, of the questions hereinafter stated, arising in the winding-up proceedings of the society above mentioned." The special case was intituled, "In the High Court of Justice: Companies (Winding-up). Mr. Justice *Vaughan Williams*. In the matter of the *Companies Acts*, 1862 and 1890, and in the matter of the *Building Societies Act*, 1874, and in the matter of the *County Courts Act*, 1888, and in the matter of the *Portsea Island Building Society*, between" the liquidators as Plaintiffs, and certain persons alleged to be members of the society as Defendants.

VAUGHAN WILLIAMS, J.

1893

In re PORTELA ISLAND BUILDING SOCIETY

The special case was in the paper for hearing on the 19th of May, 1893, when the preliminary objections mentioned below were taken on behalf of a committee of depositors who had obtained leave to attend the proceedings.

Finlay, Q C, *P. Bunting*, and *Frank Evans*, for the Committee of Depositors:—

There are two preliminary objections to the special case being heard here. The first is that the procedure by special case, under sect. 3, sub-sect. 3, of the *Companies (Winding-up) Act*, 1890, is not applied by the County Court Rules of 1892 to the winding up in the county court of a building society registered under the *Building Societies Act*, 1874. The second objection is that such procedure does not apply where the winding-up proceedings were already pending at the time when the rules came into operation. Until 1890, except as regards certain local courts, companies other than building and industrial and provident societies could only be wound up in the Chancery Division. The County Court Rules of 1889, Order XLI., rule 9, purported to apply the *Companies Acts* to the winding up of these societies in the county court; but there was then no appeal by way of special case, but only by a motion to a Divisional Court, the decision of which, unless special leave to appeal was given, would be final. Sect. 1 of the *Companies (Winding-up) Act*, 1890, vested the jurisdiction to wind up companies in the High Court, and sect. 2 empowered the Lord Chancellor by rules to assign such jurisdiction to particular judges. Under this section the jurisdiction has been vested in your Lordship. Sect. 3 provided that if any question arose in winding-up proceedings in a county court—that is, in the winding up of any company referred to in sect. 1—a special case might be stated for the opinion of the High Court. But the Act of 1890 does not apply to the winding up of building or industrial societies: *In re London and Suburban Bank* (1); *In re Real Estates Company* (2). Therefore, independently of the County Court Rules of 1892, the Act of 1890 has no application to the winding up of such societies. By sect. 164 of the *County Courts Act*, 1888 (51 & 52 Vict. c. 43), certain county court

(1) [1892] 1 Ch. 604. (2) [1893] 1 Ch. 398

Judges, with the concurrence of the Lord Chancellor and of the authority for making rules of the Supreme Court, may frame rules and orders for "regulating the practice of the Courts and forms of proceedings therein," and "such power of making rules and orders shall extend to all matters of procedure and practice, or relating to and concerning the effect or operation in law of any procedure or practice, in any case within the cognizance of county courts, as to which rules of the Supreme Court have been, or might lawfully be made for cases within the cognizance of the High Court of Justice." But this power only extends to making rules dealing with the practice in the county court. By rule 146 of the County Court Rules, 1892, which was substituted in February, 1892, for Order XLI., rule 9, of the County Court Rules, 1889, it was provided that "the provisions of the *Companies Acts*, 1862 to 1890, and the rules made thereunder, so far as they relate to winding up, shall apply to the winding up of societies registered under the *Building Societies Act*, 1874, and the *Industrial and Provident Societies Act*, 1876; and the winding up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said *Companies Acts*." But such a rule cannot extend the jurisdiction of the county court or the power to appeal. So far as the rule goes beyond dealing with practice in the county court, it is *ultrà vires*. If full force were given to the wording of the rule, it would give to county courts winding up these societies all the powers of the High Court, under sect. 1, sub-sect. 6, of the Act of 1890. It would, moreover, in a case in which the Act of 1874 has fixed the county court as the tribunal, subject suitors to the expense of litigating questions in the High Court, and possibly of being dragged as litigants before the Court of Appeal and the House of Lords. It is true that in *Andrew* v. *Swansea Cambrian Benefit Building Society* (1) it was held that the *Companies Acts* of 1862 and 1867 applied to the winding up in the county court of such societies; but assuming that decision was correct, it does not go so far as the contention against us in the present case, for in that case only statutes were held to apply which had been passed before the Act of 1874, whereas in the present case the

(1) 50 L. J. (C.P.) 428; 44 L. T. (N.S.) 106.

VAUGHAN WILLIAMS, J.

1893

In re PORTSEA ISLAND BUILDING SOCIETY

provisions of an Act passed sixteen years afterwards are sought to be applied.

Buckley, Q.C., and *Emanuel*, for the liquidators; and *Bramwell Davis* and *G. G. Greenwood* (Sir *H. James*, Q.C., with them), for the Defendants:—

At the time when *Andrew* v. *Swansea Cambrian Benefit Building Society* (1) was decided, the County Court Rule applying the *Companies Acts* to the winding up of such societies was the now repealed Order XLI., rule 9, of 1889, and that case is a distinct authority that the Acts were in force as regards such liquidations.

[VAUGHAN WILLIAMS, J.:—It is startling to hear that rules can apply a statute subsequently passed.]

If the Rules of 1889 could apply the existing *Companies Acts*, the Rules of 1892 must have a similar effect. The jurisdiction of the High Court on a special case is merely advisory. The effect of the decision in *Andrew* v. *Swansea Cambrian Benefit Building Society* is that the statute law for the time being relating to companies may by a rule be applied to the winding up of building societies in the county courts.

Finlay, in reply.

1893. June 21. VAUGHAN WILLIAMS, J.:—

A preliminary objection was raised to my hearing and deciding this special case, on the ground that the special case was stated pursuant to the provisions of sect. 3 of the *Companies (Winding-up) Act*, 1890. That section provides, by sub-sect. 3, that "if any question arises in any winding-up proceedings in a county court or in the Stannaries Court which all the parties to the proceeding, or which one of them and the Judge of the Court, may desire to have determined in the first instance in the High Court, the Judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required,

(1) 50 L. J. (C.P.) 428, 44 L. T. (N.S.) 106.

shall be transmitted to the High Court for the purposes of the determination." It was contended that this section only applied to the winding up of companies in the county court, and that it had no application to the winding up of a benefit building society. It was urged that the Act of 1890 was not incorporated with the *Building Societies Act*, 1874, sect. 32 of which enacts, by sub-sect. 4, that a society under the Act may terminate or be dissolved "by winding up, either voluntarily under the supervision of the Court or by the Court," and that "general orders for regulating the proceedings of the Court under this section may be from time to time made by the authority for the time being empowered to make general orders for the Court." And by sect. 4 of the same Act, "'the Court' in this Act means in *England* the county court of the district in which the chief office or place of meeting for the business of the society is situate" Now, it was decided by Mr. Justice *Denman* and Mr. Justice *Lindley*, in *Andrew* v. *Swansea Cambrian Benefit Building Society* (1), that the *Companies Acts*, 1862 and 1867, apply to liquidations under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42). It is said, and truly said, that this case does not decide that the *Companies (Winding-up) Act*, 1890, applies to liquidations under the *Building Societies Act*, 1874, and that a decision that the Acts of 1862 and 1867, which were in force in 1874, are incorporated by implication in the subsequent Act of 1874 falls very short of a decision that the Act of 1874 by implication incorporates the Act of 1890, which was not in force when the Act of 1874 was passed. This makes it necessary to examine the grounds of the decision in the above-cited case—a case which, it may be observed, is confirmed by the decision in *In re Sunderland Universal Building Society* (2). Now, Mr. Justice *Lindley* says that the true effect, to his mind, of the 32nd section of the *Building Societies Act* is simply this—to substitute the county court for the Court of Chancery, and that it does in effect, although not expressly, put the building societies under the Acts of 1862 and 1867, by virtue of the clauses in the Acts relating to industrial companies, although the *Companies Acts*, 1862 and 1867, are not expressly incorporated in the *Building*

(1) 50 L. J. (C.P.) 428; 44 L. T. (N.S.) 106. (2) 21 Q. B. D. 349.

VAUGHAN WILLIAMS, J.

1893

In re PORTSEA ISLAND BUILDING SOCIETY.

Societies Act. If this is the true ground of the decision, it seems to me that the provisions in force at any particular time for the winding up of companies in the Chancery Division of the High Court, which now stands in the place of the Court of Chancery, will apply to a winding up in the county court of a building society, even though such provisions may be the result of enactments passed since 1874, for the only effect of the Act of 1874 is to substitute the county court as the tribunal for winding up instead of the High Court, and the duty of the county court will, at all times, be to apply to winding up in the county court the enactments which from time to time happen to be in force for the winding up of companies. If this view is right, it follows that the provisions of the Act of 1890 for stating a special case for the determination of questions arising in the winding up of a company in a county court will apply to the winding up of a building society in the county court. It is to be observed that the particular section which Mr. Justice *Denman* and Mr. Justice *Lindley* held to apply to the winding up of a building society was sect. 43 of the *Companies Act*, 1867, which section enacts that a person dissatisfied may appeal.

There was another ground urged before me as showing that I had jurisdiction to determine this special case. It was said that jurisdiction was given to me by the County Court Rules, 1892, rule 146, which rule is as follows: "The provisions of the *Companies Acts*, 1862 to 1890, and the rules made thereunder, so far as they relate to winding up, shall apply to the winding up of societies registered under the *Building Societies Act*, 1874 . . . and the winding up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said *Companies Acts*."

And it was said that the judgments of Mr. Justice *Lindley* and Mr. Justice *Denman*, applying the Acts of 1862 and 1867 to the winding up of a building society in the county court, were partly based upon the rules of the county court adopting the orders and rules in Chancery under the *Companies Acts*, 1862 and 1867, which were utterly unworkable without the Acts themselves. I prefer, myself, to base my decision on the ground first stated, because I do not think that sect. 164 of 51 & 52 Vict. c. 43,

which enables five county court Judges, with the approval of the Lord Chancellor and the Rule Committee of the High Court, to frame rules and orders for regulating the practice in the county courts, gives power by those rules to apply to a winding-up under the *Building Societies Act* provisions of Acts of Parliament which are not by the *Building Act* itself expressly or impliedly applied to a winding-up under the *Building Societies Act.* Indeed, I doubt whether it would be competent, under sect. 164 of 51 & 52 Vict. c. 43, to frame a rule in the very terms of sub-sect. 3 of sect. 3 of the *Companies* (*Winding-up*) *Act*, 1890; for it seems to me that such a rule would do something more than regulate the practice of the county court.

Solicitors for the Committee of Depositors: *Learoyd, James, & Mellor.*

Solicitor for Liquidators: *A. W. Mills*, agent for *King & Lapthorn, Portsmouth.*

Solicitor for Defendants: *Stanley Evans*, agent for *Scotney & Shenton, Winchester.*

F. E.

C. A.
1893
May 8.

HUNTER *v.* DOWLING.

[1891 H. 3195.]

Partnership—Value of Share of deceased Partner—Direction to ascertain by Reference to last signed Annual Account—Death after expiration of Partnership Year before Taking or Signing Account.

Partnership articles provided for annual accounts and balance-sheets to be taken on the 31st of March in each year, or as near thereto as conveniently might be, and to be signed by the partners; and also provided that the share of a partner dying should be taken by the surviving partners at the amount appearing to his credit in "the last annual balance-sheet which should have been signed previously to his death."

A partner died on the 10th of April, 1891, at which time no account had been taken for the year ending on the 31st of March, 1891:—

Held (affirming the judgment of *Romer*, J.), that the amount of the deceased partner's share must be determined according to an account to be taken for the year ending on the 31st of March, 1891, and not according to the balance-sheet for the year before, which was the last annual balance-sheet actually signed by the partners.

The decision in *Pettyt* v. *Janeson* (1) discussed and applied.

THIS was an appeal from a decision of Mr. Justice *Romer* (2), where the facts of the case and the arguments on both sides are fully set forth.

The Defendants appealed.

Cozens-Hardy, Q.C., *Chadwyck Healey*, Q.C., and *J. M. Stone*, for the Appellants.

Neville, Q.C., and *Dauney*, for the Respondents.

The arguments were the same as in the Court below.

BOWEN, L.J.:—

The determination of this appeal depends upon the true construction of clauses 15 and 23 in the articles of partnership. The object of those clauses no doubt is to create a sale to the surviving partners of the share or interest of the deceased partner in such a way as shall remove to some extent the chances of litigation in case of the death of a partner. But I

(1) 6 Madd. 146. (2) [1893] 1 Ch. 391.

do not for myself think it possible to lay down as a matter of strict law that the object of the clause must be to remove altogether the possibility of litigation, and I should rather take the clause as intended to discourage litigation, and to remove to some extent—to what extent has to be determined in this action—the probability of such a contingency.

In the first place, art. 15 shews a clear intention between the parties to have a yearly account taken, and that yearly account is to be an account which ends on the 31st of March of every year. Whenever the account is taken, it is to be an account taken as up to that date, and it seems to me that on the 31st of March in every year there arose a right to have the account completed up to that date, although the taking of it might be postponed for the convenience of the parties as long as that convenience required that it should be postponed. That is to say, on the 31st of March there arose a right to have the account taken as soon as it conveniently could be taken—not as soon as it reasonably could be taken, but as soon as it conveniently could be taken. Because there may be a distinction between what was at the moment convenient to the firm and what would be considered by a stranger, looking at the matter from an outside point of view, to have been reasonable with regard to the affairs of the firm. It seems to me that the partners intended that the taking of the account should be delayed or protracted as long as was convenient, having regard to the conduct of the business, but still the right to have the account up to that date, as soon as it conveniently could be taken, matured or ripened on the 31st of March.

Now, in clause 23, which is the clause we have to construe, there is a provision as to the amount at which the share or interest of the partner who dies during the continuance of the partnership is to be taken. According to this provision it is to be taken "at the amount appearing as standing to his credit in the last annual balance sheet which shall have been signed previously to the date of such retirement or death, addition being made thereto on account of the proportion of profits which shall have accrued due to such partner since the last annual account, according to the average amount of profits during the

C. A.
1893
HUNTER
v
DOWLING
Bowen, L. J.

three years preceding the last annual account, if so many years shall have elapsed; and if so many years shall not have elapsed, according to the average amount of profits during so many years as shall have elapsed."

At the date of the death of the deceased partner in this case, the 31st of March had come and gone; and, according to the practice, which had become not unusual in the last few years, the account ought to have been taken then; and if it had been taken and completed in the usual way, it would have been completed some time between the 30th of April and the 10th of May, or thereabouts. That was the general average time within which the taking of the account ran for five or six years before, and unfortunately, before the completion of the account, but after the date of the 31st of March had arrived, the deceased partner died. He died on the 10th of April; and the question we have to consider is whether, according to the true construction of these articles, his share must be taken at the amount at which it stands in the account, not of the 31st of March, 1891, the year in which he died, because that account had not been signed, or indeed taken at the time of his death, but at the amount standing to his credit in the annual balance-sheet which had been taken the year before, and signed. If one construes clause 23 strictly, the share and interest is there to be taken at the amount appearing as standing to the credit of the deceased partner at the last annual balance-sheet which had been signed previous to his death; and if that clause, besides being construed strictly, is also to apply to all cases whatsoever, then no doubt the contention of the Appellants would be correct, and the judgment of Mr. Justice *Romer* could not be the true view of the clause. But it seems to me, I confess, that clause 23 is to be read as a clause applying only to broken portions of an accountable year; that is to say, it is not to be read, as contended by Mr. *Cozens-Hardy*, as applying to all cases alike, or even to all cases in which, besides a broken portion of an accountable year, there was also a reasonable interval which had not yet elapsed between the time when the accountable year came to an end and the time when the account had finally been taken. The clause seems to me to apply only to the broken portion of an account-

able year for the following reason: On the 31st of March in every year there did accrue at the date of the expiration of the accountable year a right to have the account taken—perhaps not immediately, as if it was taken by the instantaneous operation of a machine, but an account to be taken according to the convenience of the parties, although it still was to be one which ended at the 31st of March. And I think that clause 23, although not so distinctly enunciating the principle, must nevertheless be read as assuming that rights which have accrued are to be treated as having accrued, and as being only meant to apply to cases in which there is a broken portion of a year in which no rights to an account at all have accrued.

The opposite view would to my mind lead to considerable inconvenience. In the first place, it would make the rights of the parties depend, not upon the termination of the accountable year, but upon the time at which the account had in fact been taken; and as the protraction of that account might depend upon many circumstances which would be difficult to gauge, or the reasonableness of which protraction it would be difficult to measure, it seems to me one would be letting in, if one were to assume that clause 23 applied not only to broken portions of an accountable year, but to all occasions at which the reasonable time for taking the account at the expiration of the accountable year had not elapsed, an element of caprice and uncertainty, and indeed of litigation, which it was the object of this clause, amongst other things, to remove.

I should say that the principle which ought to be applied is the principle that that which ought to have been done must be treated as having been done—not that which ought to have been done in the sense of that which ought as a matter of duty to have been done, because there is no breach of duty here—but rather that which ought to be done in the sense of that which it was the right of the parties to have considered as either being done or about to be done. The rights to my mind had accrued at the date of the 31st of March.

Now, it is said, and with great force, that if the material clauses in the articles of partnership are not perfectly explicit and clear, one ought to give a reasonable and natural construction to the

C. A.
1893
HUNTER
v.
DOWLING.
Bowen, L.J.

letter of the provisions; and the words here are that the share is to "be taken at the amount appearing as standing to his credit at the last annual balance which shall have been signed." To some extent in a Court of Equity those words would not necessarily adjudicate or decide the rights of the parties; because in cases where there had been a variation by practice from the provisions of the articles the surviving and the deceased partners would be taken to be bound by the practice which they had substituted for the specific agreement contained in the articles. I think it is an observation which is worth making, that those who contend that the provision at all events is to apply where a reasonable time has not elapsed from the signature of the previous balance-sheet are, I think one may say at all events, introducing the very element of uncertainty which they contend ought not to be accepted in regard to these partnership articles.

The case of *Pettyt* v. *Janeson* (1) to my mind covers this case. *Pettyt* v. *Janeson* seems to me to have decided two things. The partnership articles there directed a yearly settlement on the 25th of March, and if a partner died his estate was to share in no profits subsequent to the last yearly settlement. The partnership accounts for some years had been settled, as provided by the articles, on the 25th of March in every year; but, for many years before the testator's death, that practice had been discontinued, and the settlements were made at uncertain periods, and the last settlement before the death of the testator, who died on the 13th of February, 1813, took place on the 5th of November, 1811, instead of the 25th of March. The defendant had taken steps with a view to a further settlement in October, 1812; but the plaintiff's testator had then refused to come to a settlement, and apparently it was his default or refusal which threw the matter still further over. The Court under those circumstances decided two things. It decided, in the first place, that, by the practice of the firm, which was a departure from the partnership articles, the 5th of November, 1811, might be taken to be the latest date, the date, although late, which was the date at which the settlement of the firm accounts might be properly made. That is the first point the Court decided. But the Vice-Chancellor then decided,

(1) 6 Madd. 146.

taking that date, the 5th of November, 1811, as the date at which the account ought to have been made out, and according to which date the parties ought to have come to the annual settlement on the 5th of November, 1812, that the testator's own default did not preclude the Court from directing an account and declaring his own estate entitled to a share in the profits up to the 5th of November, 1812, that being the date at which there ought to have been the last annual settlement before the testator's death. That last proposition which the Court affirmed appears to me to shew that it construed the clause like the one we have to construe as being a clause applying only to a broken accountable year. The Court had fixed the accountable year as one ending the 5th of November; but the Vice-Chancellor held that the clause only applied to a broken accountable year. It seems to me he must have held that, or else he would have considered that the testator's own default precluded his estate from reaping the benefit of having a settlement, taken down to the 5th of November previous; and I cannot myself see that, if the testator's own default did not preclude him from having a settlement taken at the exact date of the accountable year, the fact that the convenience of the parties in this case had postponed the taking of the account till after the date of the testator's death ought to have a different effect. I regard *Pettyt* v. *Janeson* (1), when analysed (and it requires analysis), as deciding really the point in principle we are deciding now. It is possible to say that the Vice-Chancellor was wrong; but that case is a very old case—nearly seventy-three years old—and it must have been considered and acted upon in partnership cases ever since that date. I am not prepared to disagree with it, because I rather on the whole myself agree with it, and certainly I do not wish to discredit it.

To read clause 23 as applying to anything except the fragment of an accountable year would be to take the letter in defiance of the spirit in order to give effect to the letter. It is perfectly true that there is no power to settle accounts between executors and surviving partners, and it is perfectly true that here there has been no breach of duty; but still, to my mind, a

(1) 6 Madd. 146.

C. A.
1893
HUNTER
v.
DOWLING

right had accrued, and clause 23 of the articles must be taken as not intended at all to displace rights which had accrued.

LOPES, L.J.:—

This case depends upon the true construction of clauses 15 and 23 of the articles of partnership, and in order to interpret those clauses we must endeavour to arrive at what the true intention of the parties was. Now, first, with regard to clause 15, I entirely agree with what has been said by the Lord Justice, and also with the judgment of Mr. Justice *Romer* in the Court below. I believe that the intention of the parties by that clause was that the yearly account was to be made up to the 31st of March in each year, that that was to be the day of annual settlement, but that it was immaterial when in fact the account was made up or taken, and immaterial when in point of fact it was signed. It ought, in strictness, to have been taken on the 31st of March, or as soon as convenient after that date; but there was the right existing to have it taken on that day. That being so, it appears to me that what we are bound to do is to regard that as done which ought to have been done. I adopt the concluding words of the judgment in *Pettyt* v. *Janeson* (1), which say that the Court must act upon that which ought to have been done as if it had been done; and I must declare that the testator's estate is entitled to a share in the profits up to the day which ought to have been the last annual settlement day before the testator's death. I regard the 31st of March, 1891, in this case to have been that last annual settlement day before the death of the partner on the 10th of April, 1891.

With regard to clause 23, I do not desire to repeat what has been said, with which I entirely agree. I believe that that refers to a broken part of a current year, and therefore does not in any way militate against the construction which I put upon clause 15. I think, therefore, this appeal must be dismissed.

KAY, L.J.:—

It seems to me that there are three possible modes of dealing with this clause 23. One is to take it literally, and to say that

(1) 6 Madd. 146.

the share of a deceased partner in the capital of the concern must be taken "at the amount appearing as standing to his credit in the last annual balance-sheet which shall have been signed previously to" his death; and that being taken literally, then, of course, it does not matter how long ago it was when the last annual balance-sheet was signed, his capital must be the amount which stood in that signed balance-sheet. That is one and a literal view of the words. Another construction is to reject the words, "which shall have been signed," not to adopt the literal meaning of them, but to treat the clause as applying where a date has occurred, before the death, up to which a balance-sheet ought to have been signed, and, although the balance-sheet has not been signed, to treat his share of capital as being the amount which would have stood in that balance-sheet if it had been taken up to that date and signed. That would be practically adding to these words "stand to his credit in the last annual balance-sheet which shall have been signed" the further words, "or which ought to have been signed before the death."

There is a third construction which, I confess, seems to me one which, in the absence of authority, I should be rather inclined to adopt, and that is this. In this case, by clause 15 balance-sheets were to be made up to the 31st of March in every year, and signed either on that day or as soon as conveniently might be after that day. That is to say, the time for the signature was not to be absolutely on the 31st of March. Of course, one can understand that, in practice, the accounts of a firm carrying on a considerable business, which had to be made up to the 31st of March, could not possibly have been ready on that day; there must be some little time after that day allowed for the taking of such accounts before they could be in such a condition as to be signed, and therefore it is quite possible that clause 23 may apply, not merely to the part of a current year, broken by the death of a partner before the end of the current year, but also to a case where the partner, having survived the current year, has yet died so soon after the 31st of March in that year as to make it practically impossible to have had the accounts taken and signed before the date of his death.

C. A.
1893
HUNTER
v.
DOWLING
Kay, L.J.

Now, that is what actually happened in this case. The testator died on the 10th of April, ten days after the 31st of March; and I think the evidence is sufficient to satisfy us that, according to the ordinary course of practice in this firm, those ten days were not a sufficient time to enable the accounts to be taken between the 31st of March preceding his death and the actual day of his death; and, therefore, this is a case where there has been no default whatever on the part of any of the partners, for they followed and observed the articles in this respect most carefully. The accounts had been taken up to the 31st of March in the next preceding year, and had been signed. And it is possible that this clause may have been intended to apply to a case of that kind, where there has been no default of the partners, but one of them has died after the current year, but still before the accounts could conveniently be taken. For it may be said the meaning is, that, where the account could not have been taken by reason of his death so soon after the last day up to which it was to be taken, then you are to take the amount standing to his credit in the last preceding account which has actually been signed as the amount of capital to which he is entitled; and then the provisions of the 23rd clause apply, in order to prevent the necessity of taking any further account after that last signed account. He then is to take a share of the profits since that date to be calculated on the profit which, of course, would appear in the books according to the average of the last three preceding years.

To my mind that is a very plausible reading of this clause, and I should have been strongly inclined to think that the right reading, and especially for this reason, that the meaning of a clause like this clause 23 is that when a partner dies his share is to be taken by the surviving partners. There is an absolute contract between the partners that the share shall be taken over by the surviving partners at a particular price; and one of the main objects of a clause of this kind is to provide for the settlement of that price in such a way as to make it unnecessary to have any partnership accounts taken after the last signed account.

But then, although that is the construction which I should

have felt strongly inclined to come to in the absence of authority, I find in the case of *Pettyt* v. *Janeson* (1) that a very similar point came before the Court, and there the Court decided that, although the account had not been taken up to the last day to which it might have been taken, and even although the non-taking of that account was owing, as it would seem, to the default of the deceased partner himself, yet, in the language of the Vice-Chancellor, the Court would consider that it must act upon that which ought to have been done as if it had been done; and, accordingly, that the account should be taken up to the last day preceding the testator's death on which it ought to have been taken; and the Court treated the clause as one which did not apply in the actual facts of that case.

There is no distinction to my mind between that case and this, except in this particular. There, there had been a neglect of the partnership articles. There was time to have taken the account up to the very last day on which the account ought to have been taken; but it had not been done, and it had not been done because the deceased partner was the very man who prevented its being done. And I am not at all sure that that does not make the case rather stronger than the present case against those who contend that no account ought in this case to be taken, and that the share of capital should be treated as that which appeared in the last signed account.

For these reasons I agree in the decision which has been come to by the rest of the Court, and think that this appeal fails, and must be dismissed with costs.

Solicitors: *Stones, Morris, & Stone; Hunter & Davies.*

(1) 6 Madd. 146.

W. W. K.

C. A.
1893
STIRLING, J.
March 10, 28.
C. A.
June 9, 12.

In re MORGAN.
MORGAN *v.* MORGAN.

[1891 M. 1202.]

Will—Annuity, Duration of—Payment out of Interest and Rents—Gift of Annuity "to A. B. or his Descendants"—Substitutionary Gift.

A testator gave all his real and personal property "upon trust to pay out of the interest and rents arising from the same the following sums of money: I give to my wife £250 per annum . . . . to *H. H. M.* or to his descendants, £250 per year; also to *P. M.* or his descendants, £250 per year; to Mrs. *A. A. H.* or her descendants £250 per year; to Mrs. *S. P.* £50 per year; to Mrs. *S. S. S.*, 10s. per week . . . . With regard to the residue of the interest and rents after the above payments have been made," the testator gave it in tenths and twentieths for certain charitable purposes in *England* and the *United States*:—

Held, by *Stirling*, J., (1.) that the annuities were given to the various annuitants for their respective lives only; and (2.) that the gifts for charitable purposes included the *corpus*. Upon appeal on the first point only:

Held (affirming the judgment of *Stirling*, J.), that the annuitants took their annuities for life only; and as to *H. H. M.*, *P. M.*, and *A. A. H.*, with substitutionary gifts to the respective descendants, if any, living at the testator's death, of such of them as should not survive the testator.

Bent v. *Cullen* (1) observed upon.

APPEAL from Mr. Justice *Stirling*.

The will of *Hosier Leslie Frederick Morgan*, dated the 20th of November, 1889, was, omitting the formal parts thereof, as follows:—

"I give and bequeath the whole of my property, both real and personal, in reversion or expectancy, unto my executors and trustees hereinafter named and mentioned, upon trust to pay out of the interest and rents arising from the same the following sums of money: I give to my wife, *Elizabeth Morgan*, £250 per annum; also the use of the house in which I now reside, also the use of all therein contained. I give to Capt. *H. H. Morgan*, or to his descendants, £250 per year. Also to Mr. *Percy Morgan*, or his descendants, £250 per year. To Mrs. *Annie*

(1) Law Rep. 6 Ch. 235.

Augusta Hardie, or her descendants, £250 per year. To Mrs. *Susan Pratten*, £50 per year. To Mrs. *Susan S. Sellar*, 10s. per week. To each of the children of the late Mr. *William Addis*, a legacy of £10. After the death of my wife I give the whole of the contents of my dwelling-house equally between Capt. *H. H. Morgan*, Mr. *Percy Morgan*, and Mrs. *Annie A. Hardie*. With regard to the residue of the interest and rents after the above payments have been made, I give one-tenth to the trustees of the *Royal Ophthalmic Hospital, Moorfields*, one-tenth to the trustees of the *London Hospital*, one-tenth to the trustees of *St. Thomas' Hospital*, one-tenth to the trustees of the *Consumption Hospital, Victoria Park*, one-twentieth to the *City of London Truss Society, Finsbury Square*, one-twentieth to the *Shipwrecked Fishermen and Mariners' Royal Benevolent Society*, one-tenth to be sent to Messrs. *Drexel, Morgan & Co.*, bankers, *New York*, for distribution amongst the poor in *New York* or any other deserving charity; four-tenths to be sent to Messrs. *Drexel & Co.*, or their representatives, bankers, *Philadelphia*, to be given by them in four equal shares amongst the poor, or any deserving charity, of the following four American cities of *Philadelphia, St. Louis, Chicago*, and *St. Francisco*. Should any one taking an interest under this my will take any proceeding in any Court of Law or Justice their gift under this my will shall become void, and I trust that every one interested will use their best endeavours to prevent the small amount I may leave from being frittered away in law proceedings."

The testator then nominated and appointed certain persons to be his executors and trustees, but made no other disposition of his real or personal estate.

The testator died on the 26th of February, 1891, leaving all the legatees mentioned in his will him surviving.

On the 23rd of April, 1891, Mr. *Horatio Morgan*, who was the heir-at-law and one of the next of kin of the testator, took out against the executors and trustees an originating summons for the administration of the testator's estate; and the usual administration order was made thereon on the 27th of July, 1891.

The case came on upon further consideration before Mr. Justice *Stirling* on the 10th of March, 1893.

C. A.
1893
In re MORGAN. MORGAN v. MORGAN.

Hastings, Q.C., and *Warrington*, for the Plaintiff.

Giffard, Q.C., and *A. L. Ellis*, for Captain *H. H. Morgan*.

Beale, Q.C., and *Swinfen Eady*, for the testator's widow and for *Susan Pratten*.

Sir *H. Davey*, Q.C., and *Ingle Joyce*, and *Buckley*, Q.C., and *O. L. Clare*, for the various charities.

March 28. STIRLING, J., held (1.) that, according to the true construction of the testator's will, the yearly sums given to his wife *Elizabeth Morgan* and the various other persons named in the earlier part of the will were not perpetual, but were payable to them for their respective lives only; and (2.) that the gifts in favour of the charities included the *corpus* of the testator's residuary estate.

C. A. Captain *H. H. Morgan* and Mr. *Percy Morgan* appealed against the first part of this decision. The appeal came on for hearing on the 9th of June, 1893.

Cozens-Hardy, Q.C., and *Warrington*, for Captain *H. H. Morgan*; and *Hastings*, Q.C., and *Warrington*, for Mr. *Percy Morgan*:—

The gift to the annuitants whom we represent and to those in a similar position is more than a gift for their respective lives. It must be construed as a gift to each of them of a perpetual annuity of a specified amount, and therefore as a gift of so much of the *corpus* as when invested, say at 2½ per cent., will produce £250 a year: *Bent* v. *Cullen* (1); *Stokes* v. *Heron* (2); *Hill* v. *Battey* (3).

Buckley, Q.C., and *O. L. Clare*, for certain of the charities:—

Bent v. *Cullen*, upon which the Appellants rely, is a doubtful authority, upon a question of the construction of a different will; it is not binding upon this Court, and it is inconsistent with *Blight* v. *Hartnoll* (4). The annuities in this case are not gifts

(1) Law Rep. 6 Ch. 235.
(2) 12 Cl. & F. 161.
(3) 2 J. & H. 634.
(4) 19 Ch. D. 294.

of definite portions of the income of a particular fund; they are simply charges on the whole income of all the testator's real and personal estate; and the words "or his descendants" are not enough to convert a life annuity into a perpetual annuity, for they are merely substitutional. Moreover, the annuities given to persons or their descendants are mixed up with and treated in the same way as other annuities which are clearly given for life only: *Wilson* v. *Maddison* (1); *Lett* v. *Randall* (2); *Blewitt* v. *Roberts* (3).

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the other charities.

Hastings, in reply, referred to *Yates* v. *Maddan* (4) and *Hedges* v. *Harpur* (5).

LINDLEY, L.J.:—

We have had the opportunity of looking into the authorities bearing upon this case, and I do not think anything would be gained by taking time to consider our judgment. The question raised by the appeal turns upon the true construction of a will which, when you first read it, looks tolerably intelligible, but when you come to study it is found to contain one point at all events which is obscure. I am afraid that one part of the testator's intention will be disappointed, because he has expressed a hope, "that every one interested will use their best endeavours to prevent the small amount of money I may leave from being frittered away in law proceedings." I suppose this will go to the House of Lords, and I suppose some of it will be frittered away. There are signs which indicate that the will was made by the testator himself; but, whoever made it, and whatever he may have meant, we have got to deal with the language which has been used. The testator gives the whole of his property real and personal to his trustees, and the passage in the will containing that gift is the only place where he mentions the *corpus* of his property apart from the income of it, except as

(1) 2 Y. & C. Ch. 372.
(2) 2 D. F. & J. 388.
(3) Cr. & Ph. 274.
(4) 3 Mac. & G. 532.
(5) 3 De G. & J. 129.

C. A.
1893
In re MORGAN.
MORGAN v. MORGAN.
Lindley, L.J.

regards some sums of £10 each which I will allude to presently, and as regards some furniture. Having given all his property real and personal to the trustees, he says that the gift is "upon trust to pay out of the interest and rents arising from the same the following sums of money." Now, why does he put in the words "out of the interest and rents"? He puts them in, as it appears to me, to exclude the idea that he is dealing with the *corpus* of his property. However, there it is. [His Lordship then read from the will the gifts to the various annuitants, and continued:—] All those are governed by the words, "upon trust to pay out of the rents and profits arising from the same the following sums of money." Those are all annuities of some sort. Then comes, "To each of the children of the late Mr. *Addis*, a legacy of £10." That is not an annuity, that is cash, also to be paid, not out of his capital according to the will, but out of the rents and interest arising from the property. Then after the death of his wife he gives the whole of the contents of his dwelling-house equally between Captain *Morgan*, Mr. *Percy Morgan*, and Mrs. *Annie Hardie*. Leaving out the furniture and so on, those are the payments which he has directed to be made out of the rents and interest of his property. Then, "with regard to the residue of the rents and interest after the above payments have been made," the testator gives it in tenths or twentieths to various charities, many of which are apparently charities having their principal places of business and offices in *America*. There is nothing else of any importance except the appointment of executors and trustees.

The question is whether, upon the true construction of this will, Captain *Morgan* and Mr. *Percy Morgan* are entitled to a capital sum which, if invested, I suppose at 2½ per cent. now, will produce £250 per year. That is to say, are they entitled, putting it roughly, to £10,000 apiece? It is said that, upon the construction of the will and the authority of certain decided cases, they are.

Now, I confess that, applying our minds to the will, which is the first thing to look at, and without troubling ourselves at all with cases, I cannot find apparent in it any intention to give these persons anything more than an annuity. I cannot see any

sign of an intention to give them a portion of the *corpus* of the testator's property. On the contrary, I think the indications are that he did not intend anybody to have the *corpus*, not even the charitable institutions. I think his own notion was that they should have the income. He never thought anything about the *corpus*, and was not dwelling upon the disposal of the *corpus* at all. He was giving these persons what he says is an annuity. I think, as regards his wife and Mrs. *Susan Pratten*, and Mrs. *Susan Sellar* to whom he gives 10*s*. a week, that is too plain for doubt. Associated with that, however, you have these three annuities or sums, or yearly payments of £250 apiece, which are given to his nephews and niece, or their descendants. Now, if the expression were, "and their descendants," I think there would be considerable force in the argument that they were to take perpetual annuities; but it is "or their descendants," and there is no context which justifies us in reading "or" as "and." Reading it as we find it, the legal effect of it is, that Captain *Morgan* takes £250 a year if he survives the testator; if he does not, but leaves descendants, which means children or grandchildren or great-grandchildren, living at the death of the testator, those children, grandchildren, or great-grandchildren, will take £250 a year as joint tenants, and that will come to an end when they die. They do not take £250 apiece—that evidently is not intended; but they take £250. It is a substitutional gift in the event of Captain *Morgan* dying in the testator's lifetime. I do not doubt that is the true effect of the expression, "to Captain *Morgan*, or his descendants, £250 a year."

Then it is said that, inasmuch as the testator only disposed of property by reference to the interest and rents, that expression was used by him as equivalent to or as another mode of dealing with the securities. I do not so read it. It may be speculative; but I cannot help thinking that the scheme of his will is to leave all he has got to charity, subject to such provisions as he has made for his nephews and niece. He gave them £250 a year or their descendants, if they died. Except to that extent, the testator intends everything to go to the charities.

I should have thought that, upon the will, the matter was reasonably plain; but we are pressed with authorities. Now,

C. A.
1893
In re MORGAN. MORGAN v. MORGAN.
Lindley, L.J.

I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course there are principles of law which are to be applied to all wills; but if you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be given to it.

The only case which is of any real importance upon the question before us is *Bent* v. *Cullen* (1), which was singularly like the present; there is no doubt at all about that. Of course there are differences, as there are differences between all wills. One difference, which is not very important, but suits the view which I have adopted, is that these particular annuities are associated with others which are certainly life annuities; there is no doubt of it at all. That is an indication of intention; but I cannot help thinking that in *Bent* v. *Cullen*, the Lord Chancellor, Lord *Hatherley*, did for a moment fail to observe the difference between giving a person a portion of the income of a fund and something payable out of it. I cannot help thinking he did so from the language which was commented upon in the course of the argument and which is to be found in his judgment. In cases of this class the distinction is not very important; but in other cases it became all-important, as was pointed out. Supposing the fund becomes deficient, it makes all the difference in the world whether a legacy is a portion of a fund or a charge upon that fund. I do not think Lord *Hatherley* throws any doubt at all on the soundness of the view more recently expressed by Mr. Justice *Fry* in *Blight* v. *Hartnoll* (2), that if an annuity is a charge as distinguished from a gift of a portion of the fund the annuity is not a perpetual annuity. I do not think the law is really open to much doubt; the application of it is the difficulty. I will read from the decision of Mr. Justice *Fry*, as he then was, in *Blight* v. *Hartnoll*, what I take the law to be. He says (3): "As a general rule there can be no doubt that the gift of an annuity

(1) Law Rep. 6 Ch. 235. (2) 19 Ch. D. 294.
(3) 19 Ch. D. 296.

to A. is a gift of the annuity during the life of A. and nothing more." That seems to be uncommonly good sense. If I give a person an annuity I do not mean that it is to last for ever. If I meant it to last for ever I should give my money in another shape. No doubt that is the legal effect *primâ facie*. "It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity." That is to say, if the annuity is given, not only to the person, but afterwards to others, in language which shews there is to be no end of it, of course it is a perpetual annuity. "It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises." I take it it cannot be said here that these annuities are the gift of a portion of a particular fund. The testator here gives the whole of his property to trustees, and he tells them out of the income to pay a certain sum of money to such and such people. It appears to me that this is distinctly a charge upon the income, as distinguished from a gift of a definite portion of the income of the particular fund. If so, there is nothing in Lord *Hatherley's* judgment which prevents our giving effect to the view which I have adopted. I agree it is very difficult to see how Lord *Hatherley* got at his decision in *Bent* v. *Cullen* (1) except by observing that I think there was a momentary forgetfulness of the distinction to which I have referred. He had there a gift out of the income of a particular fund, and the gift of the residue was of income and interest, and I agree that if you look at the two cases it is very difficult to say that there are grounds for deciding this one way and that the other. But, after all, what have we to do? We have to deal with the will before us, and on the will before us (I do not care whether *Bent* v. *Cullen* was right or wrong) I cannot see that it is anything more

(1) Law Rep. 6 Ch. 235.

C. A.
1893
In re
MORGAN
MORGAN
v.
MORGAN

than a gift of an annuity of £250 in the ordinary sense of these words. I think, therefore, the appeal must be dismissed, and I do not see why the Appellants should not pay the costs of the appeal.

LOPES, L.J.:—

Having regard to the cases, it appears to me that the true test to be applied in construing this will is this: Are these annuities, having regard to the language used, charges on a fund, or are they gifts of a part of a fund? If they are the former, they would be annuities or payments—perhaps I had better say they would be payments to be made during the life of the taker. If the latter, they would be perpetual payments. After very careful consideration, I have come to the conclusion, having regard to the language used, that these payments are charges upon a particular fund, and not gifts of a portion of this particular fund. I am quite aware that, in arriving at that conclusion, I am to a certain extent placed in a difficult position with regard to *Bent* v. *Cullen* (1), because I candidly admit myself unable to distinguish the language in this case from the language used in *Bent* v. *Cullen*. But I do find that *Bent* v. *Cullen*, although it has been subsequently referred to, is a case about which very little has been said. It appears to me to be a decision which has been repeatedly avoided. There has been, it appears to me, rather a desire in no way to deal with it. Now, I cannot get over the language, "out of the rents and interest," and so on, which is used in this case. It seems to me that such language points, not to a gift of any particular part of this fund, but to a charge upon this particular fund. I was very much impressed with the words "or his descendants," which are used in the case of two of the annuities, and "or her descendants," which is used in the case of another of the annuities of £250. At one time I thought that rather pointed to the payments being perpetual; but it is to be observed that the words are not "and to his" or "and to her," but "or to his" and "or to her" descendants, which is very different. If it had been "and," the case, I think, would have been very different. The probability is that it would almost have driven

(1) Law Rep. 6 Ch. 235.

us to a different conclusion from that at which we have arrived. What is said about these words "or his descendants" is this—that it makes the gift an alternative one. It is perfectly true that if annuities are dealt with as existing and as likely to be existing, and being operative beyond the lives of those who are to take them, that would shew an intention on the part of the testator that the annuities should be perpetual. There is no doubt that is so as a general rule; but according to my view the true interpretation of these words "or his descendants" is this—that they were used simply for the purpose of preventing a lapse. It is to my mind very difficult indeed to determine what the intention of the testator was; but I agree with what has been already said, that he intended in all probability not to dispose of the *corpus*, but to create a perpetual trust. I think that is what he contemplated. I am inclined to think it is very probable indeed that he would be more likely to desire to benefit his relations, such as the *Morgans* are, than the charities which are mentioned in the latter part of his will. It is also perfectly true that if his intention is such as I have stated, namely, to create a perpetual trust, we are defeating his intention with regard to the different charities, though I think, having regard to the strength of the language, we cannot put any other interpretation than that we have placed on the earlier part of the will, and I think, therefore, this appeal should be dismissed.

A. L. SMITH, L.J.:—

I am of the same opinion. Having heard this case well argued, it seems to me that certain principles have been laid down in the authorities, from the House of Lords downwards, which it is too late now to quarrel with. This Court is called upon to determine whether an annuity given in a will is an annuity for life or in perpetuity; and I do not understand that the judgment we are giving is trenching upon those principles at all. Keeping those principles in view, one has, in construing the instrument, to make up one's mind under which of them the instrument falls. Lord Justice *Lindley* has said everything I could wish to have said, and better than I could have said it, on the true construction of this will, and I agree with

C. A.
1893
In re MORGAN MORGAN *v* MORGAN
A. L. Smith, L J

him. I also say that if the Court has a clear opinion as to what is the true construction of a will, it ought not to be forced out of that opinion because some other Court, on some other will, at some anterior date, has said that some other testator meant otherwise. Reference to other cases on other wills is useless unless such cases lay down some canon of construction. The only doubt I have had has been by reason of the great authority of Lord *Hatherley* in *Bent* v. *Cullen* (1), for it is apparent to any one who reads this will and then reads the will in that case that the two cases are uncommonly like each other. There are, however, differences in this will which have been pointed out. First of all, all the annuitants in this will are put in a bunch, and some of them are, clearly to demonstration, not intended by the testator to take more than an annuity for life. It is said that the others do take more than an annuity for life—that they take an annuity for perpetuity. That state of things Lord *Hatherley* had not before him in the will which he then had to construe. *Bent* v. *Cullen*, as it has been pointed out, has not been acted upon; and whether it is right or wrong I really do not know, but it lays down no canon of construction. In construing this will I am clearly of opinion that these annuities never were intended by the testator to be gifts of the *corpus*, or part of the *corpus*, of the estate, and that they are only annuities for life.

Solicitors: *Burn & Berridge; Lee & Pembertons; Bircham & Co.; J. H. Lydall; Hare & Co.*

(1) Law Rep. 6 Ch. 235.

W. W. K.

In re GREGSON.

C. A
1893
June 15.

Practice—Trustee of Unsound Mind—Appointment of New Trustees—Vesting Order, Form of—Government Stock—Transfer into Names of New Trustees—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-ss.* 2, 5, 6; *s.* 139—*Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 26.

Where the stock or shares with reference to which a vesting order is being made under the *Lunacy Act*, 1890, s. 136, are Government or other stocks or shares upon which there is no liability for calls, and which are to be held by the trustees, the order should as a rule go on to direct the persons in whom the right to transfer, or call for a transfer, and to receive the dividends or income, is vested, to transfer the stock or shares into their own names.

But where shares are being dealt with on which there is a liability to calls such directions should be omitted.

Under the *Trustee Act*, 1850, and also under the *Lunacy Act*, 1890, it is competent for a Judge to make an order in either form, according to the special circumstances of the case.

The form of order adopted in *In re New Zealand Trust and Loan Company* (1) explained.

JOHN HENRY SHARP and *Samuel Moorlands Gregson* were, as the trustees of a settlement dated the 8th of August, 1848, jointly entitled to a trust fund consisting of Consols standing in their names.

S. M. Gregson became of unsound mind, and on the 15th of May, 1893, Lord Justice *Kay* made an order at Chambers appointing *Herbert James Gilbert Garbett* a trustee of the settlement jointly with *Sharp* and in substitution for *Gregson*, and ordered that "the right to call for a transfer of and to transfer the sum of" Consols standing in the books of the *Bank of England* in the names of *Sharp* and *Gregson*, "and to receive any dividends due and to accrue due thereon, do vest in the said *H. Sharp* and *H. J. G. Garbett*, as trustees of the settlement of the 8th of August, 1848."

This was the form of order which had been adopted by the Court of Appeal in *In re New Zealand Trust and Loan Company*; but the *Bank of England*, being advised that that case, which was not a *Bank of England* case, but one dealing with

(1) [1893] 1 Ch. 403.

C. A.
1893
In re
GREGSON

shares in a limited company on which there was a liability to calls, could not be accepted as a general precedent, felt unable to act upon the order made in this case on the 15th of May, 1893, unless it were amended by inserting at the end of it a direction to the trustees to transfer the Consols into their own names "to be held by them upon the trusts of the said indenture of settlement."

On the 31st of May, 1893, Messrs. *Freshfields & Williams*, the solicitors of the *Bank of England*, wrote to the solicitor of the trustees a letter to this effect, adding, "If you cannot amend the order in the manner which we suggest, it is advisable that the practice should be considered and established, and we should in that case be glad to assist you in obtaining a decision at the earliest possible moment."

The trustees and certain of the beneficiaries under the settlement now moved, with the leave of the Court in Lunacy, asking that the *Bank of England* might be directed to act upon and in accordance with the order of the 15th of May, 1893, and to pay the costs of the application.

Farwell, Q.C., and *Hornell*, in support of the motion :—

The *Bank of England* object that the order of the 15th of May, 1893, does not go on to order the trustees to transfer the stock into their own names. The precise point came before this Court in *In re New Zealand Trust and Loan Company* (1), and there the Court declined to direct the trustees to transfer into their own names. But that, of course, was not a *Bank of England* case.

[LINDLEY, L.J. :—No. In that case the subject-matter of the vesting order consisted of shares in a limited company on which there was a liability for calls. That made all the difference. I have spoken to Lord Justice *Kay* upon the subject, and he told me that his attention was not called to the form of the order, and that he intended to make the usual order. On inquiry it appears that there are two distinct classes of cases. Where it is intended that the trustees are to hold the stock or

(1) [1893] 1 Ch. 403.

shares themselves, then the old form of order is right, and there is no reason for departing from it. Where this is not the intention (and of course it would not be the intention in a case where there is a liability on the shares), then the other form is the right one. On looking at the *Trustee Act*, it seems to me perfectly competent for a Judge to make an order in either form; but I have no doubt that if the attention of the Judge had been called to it the order in the present case would not have been made in this form.]

In the present case the tenant for life has just died, the fund is now divisible, and we are instructed that the trustees do not desire to retain this stock, but simply to divide it amongst the beneficiaries. The objection of the bank seems to be that they want this direction as to the transfers from the old to the new trustees for the purpose of their book-keeping. But the question what form is to be adopted is surely one not for the convenience of the bank, but for that of the beneficiaries, and the only result of adding the words suggested would be that there must be two transfers instead of one. If the bank desire to have the practice settled, that should be done at their expense, and not at ours.

Latham, Q.C., and *Howard Wright*, for the *Bank of England*:—

If the fund is divisible, it ought to appear on the face of the order that that is the case. In the case of the *Bank of England* and Government Stocks, which are always fully paid up, there has never been more than one form—that which we say should now be adopted—and orders have been continuously made in that form since the passing of the *Trustee Act* in 1850. The bank act in such matters as administrators of the Public Debt and on behalf of the Government, and it is their duty to call attention to a departure from the established practice such as this, which would result in real inconvenience. In acting upon an order like this, they would no doubt be protected; but there is nothing to compel the person who obtains it to serve it on the bank, and the order might be kept back, while the bank, having only the original stockholders on their books, would continue to deal

C. A.
1893
In re
GREGSON.

with them. Further searches and services would be entailed, the expenses of which would ultimately fall upon the nation; on the other hand, by directing the stock to be transferred to the persons who for the time being are entitled to deal with or distribute it, safety and simplicity of accounts are insured; and as to the expense of the double transfer, that is only an additional half-crown. It seems to have been assumed that *In re New Zealand Trust and Loan Company* (1) laid down the broad principle that the order there made was to be the common form of order. But that is not so; the common form of order directs the trustees to transfer the stock into their own names: *Seton* on Decrees (2); *In re Joliffe's Trusts* (3).

[LINDLEY, L.J.:—The form in *Seton* was settled by the late Master of the Rolls.]

There may be reasons for departing from the common form, and if a Judge saw fit to make a special order the bank would of course obey; but we submit that in the *New Zealand Case* there was no intention to alter the common form.

Farwell, in reply:—

From the expressions used by the Court of Appeal in *In re New Zealand Trust and Loan Company*, it appears that the Court adopted the form of order given in *Tripp's* Chancery Forms (4) rather than that in *Seton* on Decrees; and it seems that in consequence all the orders that have been made since have been according to the former form; and a transfer into the names of the trustees has not been directed. But it appears to come to this, that by reason of their practice since 1850 the bank consider that they may disregard the express provisions of the *Lunacy Act*, 1890. The 2nd sub-section of sect. 136 of that Act empowers the Judge, in a case where any person is entitled to any stock upon trust jointly with a lunatic to make an order vesting the right to transfer or call for a transfer of such stock, or to receive the dividends thereof, either in such person alone, or jointly with any other person; and the 5th sub-

(1) [1893] 1 Ch. 403.
(2) 5th Ed. vol. ii. p. 1073.
(3) W. N. (1893) 84.
(4) Pages 222, 223.

section provides that the person or persons in whom the right to call for a transfer and to transfer is vested may do everything necessary to complete the transfer to themselves, or any other persons "according to the order, and the bank .... shall be bound to obey every order under this section according to its tenor." And though sect. 139 enables the Judge to make declarations and give directions as to the manner in which the right to transfer any stock is to be exercised, the Court here, acting in Lunacy and merely appointing a new trustee, could not properly direct a distribution of the fund; and that would be a sufficient reason for making the order in this form.

LINDLEY, L.J.:—

I have inquired of Lord Justice *Kay*, and I find that he never intended to make an order departing from the old form; and the order was, as I think, drawn up in the present form simply in consequence of what I said in the case of *In re New Zealand Trust and Loan Company* (1) (which is a different case); it was not a case of ordinary stocks, as to which there is no necessity to depart from the common form.

Therefore, what we propose to do is this: We have ascertained that there are two or three similar appeals in Lunacy—not more—and we propose to alter the orders made in those cases back into the old form, date them as of to-day (of course they will be signed); and then in future it must be understood that if, in any particular case, a Judge thinks right to depart from the old form and to make a special order (as Mr. Justice *Chitty* did in the *New Zealand Case*), it is perfectly competent for him to do it; and, if it is so drawn, of course the *Bank of England* and all other companies must obey the order. But, in this particular case, being satisfied that there was no intention to depart from the ordinary form, we will alter the order back into the old form, and date it as of to-day. The *Bank of England* will neither pay costs nor receive them. In similar cases the old form will be adhered to, unless the Judge sees fit to depart from it. If he does see fit to depart from it, we shall uphold it, as we did before.

(1) [1893] 1 Ch. 403.

C. A.
1893
In re GREENSON.

Farwell, Q.C.:—My clients will take their costs out of their own trust fund. This was made a test by the bank, and your Lordships do not think that the bank should pay them?

LINDLEY, L.J.:—I do not think that the bank ought to pay costs. The question really arose through inadvertence. The old form will be perfectly right in a case where the shares comprised in the order are fully paid up. Unless, however, the trustees really intend to become shareholders, and expose themselves to liability, it is perfectly obvious that the old form must be wrong if the shares involve liability. But that is quite another matter, and is not the case upon the motion before us.

Solicitors: *W. Sturt; Freshfields & Williams.*

W. W. K.

C. A.
1893
June 23

In re SIR J. J. ENNIS.
COLES *v.* PEYTON.

[1884 E. 805.]

Principal and Surety—Contribution between Co-Sureties.

F., with *E.* and *B.* as his sureties, gave a bond to a society to secure the payment of a sum at the end of five years, and of interest in the meantime. It was provided (*inter alia*) that if *E.* and *B.* or either of them should die, and if *F.* did not within a month procure a solvent person to enter into a further bond to the same effect as the present one, the principal should become immediately payable. *E.* died, and a fresh bond was entered into by *F.*, *B.*, and *H.* to the same effect as the former bond, with an additional provision that the giving it should not release the heirs, executors, or administrators of *E.*, or in any way alter, vary, or lessen their liability, or affect any right or remedy of the society under the first bond.

B. and *H.* paid the debt and applied to prove against the estate of *E.* *Bacon*, V.C., held that they were entitled to prove for half what they had paid *E.'s* executors appealed, contending that *E.'s* estate was released, and if not, that it was liable to *B.* and *H.* only for one-third of what they had paid:—

Held, by the Court of Appeal, that *E.'s* estate was not released, but that it was liable only for one-third, and not for one-half, of what *B.* and *H* had paid.

IN 1881 *W. Finnie* proposed to borrow from the *Life Association of Scotland* £2250, which the association agreed to lend on his

giving a bond with two sureties and insuring his life in their office. By a bond dated the 14th of May, 1881, *Finnie*, Sir *J. J. Ennis*, and *L. W. Burnand*, jointly and severally bound themselves to the association in the penal sum of £4500. The bond recited that *Finnie* had insured his life with the association for £3000, and deposited the policy with them. The condition was that if the obligors or any of them, their, or any of their heirs, executors, or administrators, should pay to the association £2250 on the 14th of May, 1886, and in the meantime pay interest at £7 per cent. on the 14th of November and the 14th of May in each year, and also should, as long as any money remained owing on the security of the bond, pay the premiums and other moneys necessary for keeping up the policy, "and if" *Finnie* should not during that period do any act to avoid the policy, or become bankrupt or make any assignment or arrangement for the benefit of his creditors, or take the benefit of any insolvent Act, "and if" while any money remained on the security of the bond *Ennis* and *Burnand* or either of them should die or become bankrupt, &c., or go to reside beyond the sea, and *Finnie* should within one calendar month after such act or event procure some other substantial person or persons (to be approved of by the association) to enter into a further bond in the like sum and to the like effect as the present bond, and in case, while any money should remain on the security of the present bond, the policy should not become void or voidable, or liable to be forfeited, and *Finnie* should not die, then the bond should be void. Then followed a proviso for reduction of interest on punctual payment, and a proviso that if default should be made in payment of principal or interest, or if while any money remained owing on the bond *Finnie* should become bankrupt, &c., or if while any money remained on the security of the bond *Ennis* and *Burnand* or either of them should die or be declared bankrupt, &c., and *Finnie* should not within one calendar month procure some other person or persons to enter into such bond as aforesaid, or if while any money remained on the security of the bond the policy should become void or voidable, or liable to be forfeited, then the £2250, or so much as remained owing, should become immediately payable. It was further declared that *Ennis* and

C. A.
1893
In re Sir J. J. Ennis
Coles v. Petton

Burnand, and each of them, their and each of their heirs, executors, and administrators, should be bound as fully as if they had been singly bound by the bond as principals, and not as sureties, and that notwithstanding any neglect or delay of the association in seeking to obtain payment from *Finnie*, "and notwithstanding their accepting any additional bond under the provisions in that respect hereinbefore contained," or not making available any collateral security or giving time to *Finnie* for payment.

Sir *J. J. Ennis* died on the 28th of May, 1884.

On the 21st of March, 1885, *Finnie*, *Burnand*, and *W. H. Houldsworth* gave to the association their joint and several bond for £4500. This bond recited the former bond and the death of *Ennis*, and that "the said association have approved of the said *W. H. Houldsworth* as the person to enter into a bond jointly with the said *W. Finnie* and *L. W. Burnand* in substitution for the said bond bearing date the 14th day of May, 1881." The condition and subsequent parts of this bond were identical with those of the former; but this clause was added at the end: "Provided always that the above written bond shall not, nor shall anything herein contained, release or discharge the heirs, executors, or administrators of the said Sir *J. J. Ennis* from the said sum of £2250, secured by the said bond of the 14th of May, 1881, or any part thereof, or in any way alter, vary, or lessen the liability of the heirs, executors, or administrators of the said Sir *J. J. Ennis*, or affect any right of action or other remedy the said association, their successors or assigns, now have, or shall hereafter have or be entitled to, under or by virtue of the last-mentioned bond; and, further, that as against the said *W. Finnie* and *L. W. Burnand* respectively, and all persons deriving title under them respectively, the said last-mentioned bond shall, to all intents and purposes, remain in full force and effect, and shall and may be enforced in the same manner in all respects as if the above-written bond had not been executed."

Finnie became bankrupt in February, 1886, and the association applied to *Burnand* and *Houldsworth* for payment. They paid what was owing on the bond in equal shares, and took from

the association assignments of the bonds and the policy of assurance.

The estate of Sir *J. J. Ennis* was being administered by the Court, and *Burnand* and *Houldsworth* sent in claims, each for one moiety of the sum he had paid, on the footing that the estate of Sir *J. J. Ennis* remained liable to one-half of the moneys payable under the first bond as if the second had not been executed.

Mr. *Peyton*, the executor of Sir *J. J. Ennis*, took out a summons for directions. *Bacon*, V.C., in Chambers, on the 2nd of July, 1886, decided that the claimants were creditors of the estate of Sir *J. J. Ennis* to the extent of one moiety of the sums they had paid to the Association. No order was drawn up.

On the 24th of February, 1893, the Chief Clerk's certificate of debts in the administration action was filed, and certified *Burnand* and *Houldsworth* to be creditors, as decided by *Bacon*, V.C. Mr. *Peyton* took out a summons to vary the certificate in this respect. Mr. Justice *Kekewich*, to whose Court the action was attached, declined to consider the point, as it had been decided by *Bacon*, V.C., and dismissed the summons. *Peyton* appealed.

Warmington, Q.C., and *Methold*, for the appeal:—

First, on a new bond being given the liability of the estate of the deceased surety determined.

But if the estate of Sir *J. J. Ennis* is liable, it is liable only to contribute one-third of what the other two sureties paid. According to the decision of *Bacon*, V.C., if we had paid the debt we could have recovered the whole from *Burnand* and *Houldsworth*, which is absurd, for the rights of sureties *inter se* cannot depend on which of them pays the creditor. The proviso in the second bond means nothing more than that the estate of the deceased surety is not to be released.

Marten, Q.C., and *John Henderson*, for *Houldsworth*:—

There is not a word in either bond pointing at a release of the estate of a deceased surety when a new bond is given. The

C. A.
1893
In re Sir J J Ennis
Coles v Peyton

relative position of sureties is shewn by *Dering* v. *Earl of Winchelsea* (1) and *Steel* v. *Dixon* (2), and as a general rule they contribute equally.

[Lopes, L.J., referred to *Coope* v. *Twynam* (3).]

But a surety may contract himself out of his rights against a co-surety, and where a new surety comes in upon special terms he is not liable in the same way as if he had been an original surety: *Craythorne* v. *Swinburne* (4). Here the second bond was given when the liability of Sir *J. J. Ennis* was fixed at one moiety, and it was entered into on the footing that his liability should not be altered.

Pauli, for *Burnand*.

Methold, in reply.

Lindley, L.J.:—

This is a case of some difficulty owing to the language of the first bond. *Finnie* borrowed money from the *Life Association of Scotland*, and entered into a bond with two sureties for its repayment. The sureties were *Burnand* and Sir *J. J. Ennis*. On the death of Sir *J. J. Ennis* the association took another bond, in which *Burnand* and *Houldsworth* were the sureties. They have paid the debt, and the question is whether the estate of Sir *J. J. Ennis* has been discharged, and, if not, then what proportion of the debt it ought to pay.

The original bond is not easy to construe; but I cannot find enough in it to enable me to say that the estate of a deceased surety is released upon a new bond with two sureties being given. I think that the object of the provisions as to a new bond was to secure two solvent living sureties within the kingdom, but not to give up any security the association had. I am satisfied, therefore, that the giving the new bond does not release the estate of Sir *J. J. Ennis*. His executors were not parties to the new bond, and there was no need that they should be; but the asso-

(1) 1 Cox, 318.
(2) 17 Ch. D. 825.
(3) T. & R 426.
(4) 14 Ves. 160.

ciation reserves its rights against them, and there is nothing to release them.

This disposes of the main question. The estate of Sir *J. J. Ennis* is liable to contribute, but to contribute what? The decision under appeal makes it liable to contribute half of what *Burnand* and *Houldsworth* have paid. I think that is not right. A surety is entitled to the benefit of every security held by the creditor. Suppose the executors of Sir *J. J. Ennis* had paid the debt, they would have been entitled to recover two-thirds from *Burnand* and *Houldsworth*. The object of the final proviso in the second bond was only to preserve the rights of the association against the estate of Sir *J. J. Ennis*, not to fix the amount of the liability of the estate to the other sureties.

Lopes, L.J.:—

For a long time I was inclined to think that the taking the new bond discharged the estate of Sir *J. J. Ennis* but on consideration I do not think that the language of the first bond admits of that construction. If an action had been brought by the association against his executors for the whole amount, their only defence would have been to put in evidence the second bond, and I think that the taking it did not release the estate of the deceased surety.

As to the second point, I feel no doubt that the estate of Sir *J. J. Ennis* is liable to the other sureties for one-third of the whole sum, and no more.

A. L. Smith, L.J.:—

The only provisions in the first bond on which the executors of Sir *J. J. Ennis* could rely if an action were brought against them on the bond would be those as to the giving a new bond. What was the object of those provisions? Was it to release the estate of the deceased surety, or to give a further benefit to the association? In my opinion, the latter only. If a surety dies or goes abroad, a new surety is to be put in, so that the association may always have two sureties in the kingdom who can be applied to, and it would be straining the clause to go further.

C. A.
1893
In re SIR J. J. ENNIS
COLES v. PEYTON

As to the other point, it is to my mind plain that the liability is divisible in thirds, and that one-third only is to be borne by the estate of Sir *J. J. Ennis.*

Solicitors: *Wynne & Son; Rose & Johnson; Wilde, Berger, & Moore.*

H. C. J.

C. A.
1893
June 29, 30; *July* 11.

In re DUKE OF CLEVELAND'S SETTLED ESTATES.

[1892 C. 2247.]

Conversion—Money directed to be Invested in Land—Devise of Real Estate—Trust to Re-invest in Land.

Money arising from the sale, under a power, of lands in *Staffordshire* forming part of the *C.* settled estates, was held upon trust to invest it in lands in *England* or *Wales*, to be settled upon the limitations of the *C.* settlement. Under that settlement *C.* was tenant for life, with remainder to his first and other sons successively in tail male, with remainder to himself in fee. He died without issue, leaving a will by which he gave all his lands in *Staffordshire* to trustees upon trusts for the benefit of one family, and gave all his real and personal estate not otherwise disposed of to trustees for another family:—

Held, by *Kekewich*, J., that the money went to the persons entitled to the *Staffordshire* lands:

Held, by the Court of Appeal, that the moneys, being impressed with a trust to invest in land, were to be treated as land and would pass under a devise of land. Observations of *Jessel*, M.R., in *Chandler* v. *Pocock* (1) considered:

But *held* that, as under the trust the money might have been invested anywhere in *England*, it would not pass under a devise of lands in *Staffordshire*:

Held, therefore, that it passed under the residuary devise of real estate.

UNDER indentures of lease and re-lease, dated the 3rd and 4th of November, 1809 (being a settlement made on the marriage of the second Duke of *Cleveland*), and the will of the first Duke of *Cleveland*, who died in 1842, the 4th Duke of *Cleveland* (the third son of the first Duke) became, on his succeeding to the title in 1864, entitled, as tenant for life in possession, to extensive estates in *Durham*, *Staffordshire*, and other counties,

(1) 15 Ch. D. 491.

with remainder to his first and other sons successively in tail male, with divers remainders over.

In 1866 it was found desirable to dispose of parts of the settled estates for building purposes; and the settlement and will not containing effectual powers for selling and granting building leases, a private Act (30 & 31 Vict. c. i.) was passed, by which trustees were appointed, to whom (*inter alia*) power was given to sell and dispose of all or any parts of the properties mentioned in the schedule to the Act; and it was enacted that the provisions of *Lord Cranworth's Act* (23 & 24 Vict. c. 145) should extend to sales made under the authority of this Act, and to all matters consequent thereon (1). The schedule comprised various lands in *Durham* and *Staffordshire*.

In 1872 the tenant for life in remainder immediately expectant on the limitations to the fourth Duke's sons in tail male, and his eldest son, who was tenant in tail male in remainder, executed, with the consent of the fourth Duke as protector, a disentailing assurance of the settled estates, and conveyed their remainder in fee to the fourth Duke, so that the estates thenceforth stood limited to the fourth Duke for life, with remainder to his first and other sons successively as tenants in tail male, with remainder to himself in fee.

(1) By 23 & 24 Vict. c. 145, s. 4, it is enacted that money received upon any sale under the power of sale given by the Act shall be laid out in the manner indicated by the instrument containing the power; "or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in *England* or *Wales* or in *Ireland* (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed, or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges. . . ."

C. A.
1893
In re DUKE OF CLEVELAND'S SETTLED ESTATES.

The fourth Duke died without issue on the 21st of August, 1891, having made his will dated the 22nd of July, 1891, by which he devised certain specified estates, and "all the manors, advowsons, and other messuages, lands, and hereditaments in the counties of *Middlesex*, *Durham*, *Northampton*, *Salop*, and *Stafford*, or any of such counties, which at my death I shall be entitled to or have power to dispose of for an estate in fee simple, legal or equitable," to the use of trustees upon trust to settle them as therein mentioned. These estates were commonly known as "the *Raby* estates." The testator then, after making devises of his real estates in some other specified counties, and giving various pecuniary and specific legacies, devised and bequeathed "all the real and personal estate not hereinbefore otherwise disposed of, to which at my death I shall be beneficially entitled, or of which I shall have any general power to dispose beneficially by will," to trustees upon trust for the benefit of the *Hay* family.

Considerable sums of money had arisen during the life of the fourth Duke from the sale of parts of the *Staffordshire* property comprised in the Act, and had been invested in Consols, and so remained invested at the time of his death. The trustees of the Act took out an originating summons which at first was confined to a question as to the payment of certain expenses out of these funds, but, as amended, asked to have it determined to whom the moneys arising from the sale of settled lands and then in the hands of the trustees of the Act belonged.

Mr. Justice *Kekewich* decided that these funds, having arisen from the sale of parts of the *Staffordshire* estate, went with those estates, and that the devisees of the *Staffordshire* estates were entitled to them. The residuary devisees and legatees appealed.

Cozens-Hardy, Q.C., and *Ashworth James*, for the Appellants:—

The Appellants are residuary devisees as well as residuary legatees, and in one of these characters are entitled to the fund in question. The right view, as we contend, is that it is personal estate. The trusts of the settlement were at an end at the death of the testator, when the will came into operation. No one had any interest in the fund except the testator. He had

entire control over it, and therefore it must be held to be in the condition in which it was at the time of his death: *Chandler* v. *Pocock* (1) is directly in point.

But, assuming that it was real estate, it was not part of the *Staffordshire* estate. It might have been re-invested by the trustees in land in any part of *England* or *Wales*: therefore the devisee of the *Staffordshire* property has no claim to the money. The 4th section of *Lord Cranworth's Act* (23 & 24 Vict. c. 145) does not oblige the trustees to purchase land in *Staffordshire*.

Sir *H. Davey*, Q.C., *Warmington*, Q.C., and *Ingle Joyce*, for the Respondents:—

The fund was real estate at the time of the testator's death, and would without doubt have descended to his heir-at-law if he had died intestate. In *Chandler* v. *Pocock*, the testatrix had exercised an election to take the fund as personalty. In the present case there has been no election. Being real estate, it must be considered to be part of the estate to which the land sold belonged, and ought, under sect. 4 of the 23 & 24 Vict. c. 145, to be held on the same trusts as the land which has been sold would have been held on. *Wheldale* v. *Partridge* (2) is clearly opposed to this fund having the character of personalty.

Cozens-Hardy, in reply:—

In *Chandler* v. *Pocock* (3), the observations of the Master of the Rolls are decisive, that this fund is to be considered personalty, for at the testator's death there was no one who could call for an investment in land. In the case of *In re Greaves's Settlement Trusts* (4), the question whether stock was to be treated as land or money was held to turn upon this.

[Sir *H. Davey* referred to *Attorney-General* v. *Marquis of Ailesbury* (5).]

We ask the Court to say that this fund passed under the gift of personal property. But if it is land, still we are entitled to it as residuary devisees.

(1) 15 Ch. D. 491; 16 Ch. D. 648.
(2) 8 Ves. 227, 235.
(3) 15 Ch. D. 491, 499.
(4) 23 Ch. D. 313.
(5) 12 App. Cas. 672.

C. A.
1893
In re DUKE OF CLEVELAND'S SETTLED ESTATES

Mr. Justice *Kekewich* held that it did not pass under any of the gifts, but decided the case on 23 & 24 Vict. c. 145, s. 4. But that section does not contain any reference to locality.

July 11. The judgment of the COURT (*Lindley, Lopes,* and *A. L. Smith,* L.JJ.) was delivered by

LINDLEY, L.J.:—

We have here to consider, not whether the will has disposed of the fund, but which of several clauses in the will has most aptly described it. In *Chandler* v. *Pocock* (1), the question was simply whether the will in that case had any application to the fund in question, and it was decided, both by Sir *George Jessel* and by the Court of Appeal, that it had. We have to consider an entirely different question, and this fact must not be lost sight of in considering the observations made by Sir *G. Jessel* in the case referred to, and relied upon by the Appellants' counsel as conclusive in their favour.

The property in dispute here is a sum of £30,000 or thereabouts, arising from the sale of lands in *Durham* and *Staffordshire.* The money was held by trustees upon trust to reinvest in other lands in *England* or *Wales.* The lands sold did belong, and any lands bought with the money produced by them (if acquired in the testator's lifetime) would have belonged, to him for life, with remainders to his first and other sons in tail, and with the ultimate reversion in himself in fee. Whilst the money was uninvested it was held on similar trusts.

The lands from which the money arose had been sold many years before the testator made his will; and the money had not been reinvested in land in his lifetime. When he made his will, and when he died, the money remained invested in Government stocks or securities.

The testator had no children; but he could not in his lifetime have called upon the trustees to pay the money over to him. He could, however, have disposed of the reversion by deed or will, and he could have treated his reversionary interest in the money either as real estate or as personal estate, as he might have

(1) 15 Ch. D. 491; 16 Ch. D. 648.

thought proper. Had he died intestate the money would have devolved on his heir-at-law. All this we take to be clear.

Unfortunately, the testator has not by his will alluded in terms to this money. He has disposed of his estates in *Staffordshire, Durham,* and other counties, describing them as situate in the counties in which they in fact are. He has devised all his real estates not otherwise disposed of, and he has bequeathed all his residuary personal estate; and the two last classes of property have been devised and bequeathed to the same persons. The question now arises, Who is entitled to this money? Does it belong to the devisees of the estates in *Staffordshire* and *Durham,* or to the devisees of the testator's real estate not otherwise disposed of, or to the legatees of his residuary personal estate?

The learned Judge has decided in favour of the devisees of the *Staffordshire* and *Durham* estates. He has declared that the money in question belongs to the person who, under the will of the testator, would have succeeded to the lands from which the money arose, if those lands had not been sold. Hence this appeal.

The language used by the testator in devising his *Staffordshire* and *Durham* estates and his residuary estate is as follows: after devising certain specified estates he devised "all the manors, advowsons, and other messuages, lands, and hereditaments in the counties of *Middlesex, Durham, Northampton, Salop,* and *Stafford,* or any of such counties, which at my death I shall be entitled to, or have power to dispose of for an estate in fee simple, legal or equitable." The words used in disposing of the residuary estate are, "all the real and personal estate not hereinbefore otherwise disposed of, to which at my death I shall be beneficially entitled, or of which I shall have any general power to dispose beneficially by will."

The Appellants contend that the moneys in question cannot be regarded as lands in the counties of *Durham* and *Stafford,* or either of them, which at the testator's death he should be entitled to or have power to dispose of in fee simple.

First, can the moneys be regarded as lands at all? We have no doubt they can. The trustees were bound to lay the moneys

C. A.
1893
In re DUKE OF CLEVELAND'S SETTLED ESTATES

out in land, unless directed not to do so by some person entitled to give such a direction. The testator might have given such a direction by his will, or even prospectively in his lifetime, for after his death without issue he was master of the fund. But, in the absence of any indication of intention by him to treat the fund as personal estate, the fund ought to be regarded as land at the time of his death, and as land which he had power to dispose of in fee. Notwithstanding the observations of Sir George *Jessel* in *Chandler* v. *Pocock* (1), money which a testator has not got into his own hands, and which he has no right to have in his own hands, and which is held upon trust for investment in land, is, in our opinion, to be treated as real estate, although, if he has power to dispose of such money, he can dispose of it either as land or money, as he may think right. The absence of any person after his death to require an investment in land cannot be the real test of what it is in his lifetime. If he says nothing to the contrary, the money must be treated as if it were invested in land up to and at the time of his death. The older authorities, such as *Guidot* v. *Guidot* (2), and the decision of Mr. Justice *Fry* in *In re Greaves's Settlement Trusts* (3), all shew this; and, bearing in mind the point which was before the Court in *Chandler* v. *Pocock*, we do not feel at all clear that the late Master of the Rolls would have held that a devise of real estate would not pass money in the position of that which is here in question. If he really did mean to go that length, we could not agree with him.

Treating the money, then, as land, the question is, What land? The Appellants contend that no particular locality can be attributed to this money, and that it cannot pass under the description of land in a particular county. No doubt all land must be situate somewhere, and money which may be laid out in land situate anywhere cannot have its locality fixed by reference to its future unknown disposition. But then it is suggested that, just as in *Attorney-General* v. *Marquis of Ailesbury* (4), land was treated as the money with which it was bought, so here the money, until again laid out in land, represents, and

(1) 15 Ch. D. 491.
(2) 3 Atk. 254.
(3) 23 Ch. D. 313.
(4) 12 App. Cas. 672

stands in the place of, and ought to be treated as, the land which produced it—*i.e.*, as land locally situate where the land which produced it was. This reasoning is, in our opinion, unsatisfactory. We cannot judicially hold, as a general proposition, that money which has to be laid out in land situate anywhere in *England* or *Wales* will pass under a devise of lands in a particular county, even if the money arose from the sale of land in that county. We should have no difficulty in holding such to be the case if there was any indication of intention to that effect; but in the will before us there is none. It is true that we are dealing with a case in which a portion of a settled estate has been sold, and the money arising from its sale is to be laid out in land to be brought into the same settlement, and that such money may well be treated as land subject to the same settlement, and might well pass under any words which indicated an intention to pass the whole of the settled lands. But, even after looking to the Act of Parliament which authorized the sale of the lands from which the money in question has arisen, and looking to the statutory destination of the money, and, although we think it very likely that if the testator had had his attention called to this money he would have wished it to go with his *Raby* estates, the language of his will does not justify us in holding that it does so. There is property which exactly answers the testator's own careful description of his *Raby* estates, and to hold that money which does not answer that description must be dealt with as if it did, would be to depart from well-settled principles of construction. Those principles will be found expounded by Lord *Cairns* in *Martineau* v. *Briggs* (1), and by Lord Chief Justice *Erle* in *Webber* v. *Stanley* (2), to which may be added *Homer* v. *Homer* (3). All of these are striking instances of the rigidity of the rule which precludes a Court, when construing a will, from giving effect to an intention not expressed by a testator, and which cannot be extracted from his language, when that language is clear in itself and is strictly applicable to some subject-matter with which the testator was dealing. The money here is not described by the language applicable to

(1) 23 W. R. 889; 45 L. J. (Ch.) 674.

(2) 16 C. B. (N.S.) 698.

(3) 8 Ch. D. 758.

C. A.
1893
In re DUKE OF CLEVELAND'S SETTLED ESTATES.

the *Raby* estates, and it is described by the language applicable to the residuary estate.

For these reasons we are of opinion that the money in question must be treated as included in the testator's residuary devise of his real estate. The appeal will therefore be allowed, but the costs here and below ought to be borne by the fund in question. A summons to obtain the opinion of the Court was eminently proper, and no costs have been unreasonably or improperly incurred.

Solicitors: *Williams & James; Trower, Freeling, & Parker; Jennings & Finch.*

H. C. J.

C. A.
1893
July 17, 18.

In re LORD GERARD'S SETTLED ESTATE.

[1893 G. 391.]

Settled Land Act—Application of Capital Moneys—Mansion-house—Chapel—Stables—Agent's House—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s. vii.—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-ss. ii., iv.*

The question whether any particular application of capital money under the *Settled Land Acts* should be sanctioned by the Court must be determined entirely by the code of rules laid down in the *Settled Land Acts*, and not by reference to the decisions as to the application of purchase money under the *Lands Clauses Act.*

A scheme was proposed by a tenant for life for the application of "capital moneys" under the powers of the *Settled Land Acts* in the following improvements:—(1.) Building additions to the mansion-house and improving its architectural appearance. (2.) Building a chapel for Roman Catholic service. (3.) Building new stables, the present stables being inconvenient and insufficient. (4.) Building a house for the residence of the estate agent.

Held (affirming the decision of *Chitty*, J.), that none of the proposed improvements were such as the Acts authorized for the application of capital moneys.

In re Houghton Estate (1) disapproved.

Semble, the limitation of half the annual income of the settled land placed upon the expense of rebuilding a mansion-house by the *Settled*

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(1) 30 Ch. D. 102.

Land Act, 1890, sect. 13, sub-sect. iv. refers to the whole of the land subject to the settlement, and not to the particular estate on which the house is situate.

THIS was an application under the *Settled Land Acts* by Lord *Gerard*, the tenant for life of settled estates in *Lancashire* and *Kent*, for the sanction of the Court to a scheme for expending part of the capital moneys subject to the trusts of the settlement in certain improvements on the *Eastwell Park* estate in the county of *Kent*.

The estate formerly belonged to the Earl of *Winchelsea*, and had been recently purchased by Lord *Gerard* and the trustees of the settlement for £198,000, of which £120,000 remained on mortgage of the estate. The extent of the estate is about 6000 acres. The mansion-house stands in a large park, but is smaller than would have been expected from its surroundings, and is of no architectural beauty. The late Earl of *Winchelsea* began to improve it, but his improvements were only partially carried out. The scheme now proposed comprised the following improvements:—

1. To build two towers at the north-east and south-east angles of the house to correspond with those existing at the other two angles.

2. To remove the present portico and erect a new portico and vestibule.

3. To build an addition to the east wing so as to make it correspond with the west wing.

4. To face the north front with stone and introduce mullioned windows.

5. To build a chapel for Roman Catholic service, Lord *Gerard* being a member of that faith, and there being no Roman Catholic chapel nearer than four-and-a-half miles.

6. To renew the stone copings and finials of the west wing.

7. To build new stables. The scheme stated that the present stables were of the same date as the original mansion and were in a very uncomfortable and unsuitable condition and wholly insufficient for the requirements of the mansion. The estimated cost of the stables was £6500.

8. To build a house for the estate agent on the property at an

C. A.
1893
In re LORD GERARD'S SETTLED ESTATE

expense of £750. The agent had hitherto lived in one of the farmhouses.

The estimated amount of all the improvements was £18,250.

Lord *Gerard* had expended out of his own money more than £34,000 on other improvements. The trustees were willing to accede to the scheme if the Court should be of opinion that they could do so consistently with their duty. They accordingly applied for the direction of the Court.

Mr. Justice *Chitty* was of opinion that none of the proposed improvements were such as the Acts authorized to be paid for out of capital moneys (1).

Lord *Gerard* appealed from this decision.

Byrne, Q.C., and *Upjohn*, for the Appellant:—

There can be no doubt that the objects proposed by the scheme, if carried out, would be a great improvement to, and

(1) The following clauses of the *Settled Land Acts* of 1882 and 1890 were commented on in the argument.

45 & 46 Vict. c 38, sect. 21. "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, namely:—

* * * *

"(iii.) In payment for any improvement authorized by this Act.

* * * *

"(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase . . .

Sect. 25. "Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes

* * * *

"(x) Cottages for labourers, farm servants, and artisans, employed on the settled land or not.

"(xi) Farmhouses, offices, and outbuildings, and other buildings for farm purposes"

53 & 54 Vict. c. 69, sect. 13. "Improvements authorized by the Act of 1882 shall include the following, namely:—

* * * *

"(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let

* * * *

"(iv) The rebuilding of the principal mansion-house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land."

add to the value of the estate. The only question is, whether they can be carried out at the expense of the estate. Under the legislation existing prior to the *Settled Land Act*, 1882, that is to say, under the *Lands Clauses Consolidation Act*, 1845, and the *Settled Estates Act*, money liable to be invested in the purchase of land might properly be applied in additions to an estate in the shape of new buildings, or an enlargement of an existing house, as being equivalent to the purchase of land: *Drake* v. *Trefusis* (1); *In re Speer's Trusts* (2); *In re Johnson's Settlement* (3). As large an interpretation ought to be placed on sect. 21, sub-sect. vii., of the *Settled Land Act*, 1882—enabling capital money to be invested in "purchase of land in fee simple" —as under the corresponding section, sect. 69 of the *Lands Clauses Act*: *In re Lytton's Settled Estates* (4). The *Settled Land Act*, 1882, should be regarded, in part, as an extension of the *Lands Clauses Act*. It was never intended to deprive the Court of the power of applying capital money in the same way as it could be applied under previous legislation. The proposed agent's house and stables are undoubtedly "new buildings," upon which capital money may be expended. Under sect. 13, sub-sect. ii., of the *Settled Land Act*, 1890, improvements authorized by the Act of 1882 include "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." That section covers the present case. In *In re De Teissier's Settled Estates* (5), Mr. Justice *Chitty* seems to have thought this section meant that there must be an actual letting in contemplation: but that, we submit, is a narrow construction. The true meaning must be that the additions or alterations are to be such as to make the buildings fit to be let.

[LOPES, L.J.:—I think Mr. Justice *Chitty's* construction is that which I should myself put upon the sub-section.]

The present stables are quite unsuited to the mansion-house and to the requirements of the family, or of the occupants of it. Moreover, it may be said that the proposed rebuilding of the stables as well as the alterations to the house amount to such

(1) Law Rep. 10 Ch. 364.
(2) 3 Ch. D. 262.
(3) Law Rep. 8 Eq. 348.
(4) W. N. (1884) 193.
(5) [1893] 1 Ch. 153, 156, 158.

C. A.
1893
In re LORD GERARD'S SETTLED ESTATE

a "rebuilding" of the mansion-house as is authorized by sub-sect. iv. of the same section—that is, putting the house into a condition suited to the position of the present family and its successors.

[LOPES, L.J.:—What do you say as to the chapel?]

That would make the house more attractive.

We shall be satisfied if the expenditure is allowed on the stables and agent's house. With respect to them we have the express authority of *Bacon*, V.C., in *In re Houghton Estate* (1). We do not press for the other improvements.

T. C. Wright, for the trustees:—

The stables are not part of the mansion-house, nor are they intended to be rebuilt because they are ruinous; but new stables are to be built on a different site to suit the taste and convenience of the tenant for life. Sect. 13, sub-sect. iv., of the Act of 1890, limits the expenditure on rebuilding a mansion-house to half the annual income of the estate. Half the income of the *Eastwell Park* estate, which is heavily mortgaged, would not be sufficient to meet the proposed expense of the stables.

[LOPES, L.J., referred to *In re Lord Stamford's Settled Estates* (2).]

The stables do not come within sub-sect. ii., for although they might improve the value of the property if it were let, there is no intention or prospect of letting it: *In re De Teissier's Settled Estates* (3). With respect to the agent's house, it is not within either of the sub-sects. x. and xi., of sect. 25, of the Act of 1890, for it is neither a labourer's cottage nor a farmhouse, and would be simply an addition to the salary of the land agent. In the case before *Bacon*, V.C. (in *In re Houghton Estate*), the house appears to have been a farmhouse.

Byrne, in reply.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty* made upon the application of the trustees for the purposes of the

(1) 30 Ch. D. 102. (2) 43 Ch. D. 84. (3) [1893] 1 Ch. 153.

Settled Land Acts, who ask for the opinion of the Court upon this question: "That it may be declared that all the improvements and works specified in two schemes," mentioned in the summons, "submitted for their approval, and proposed to be executed to and upon the *Eastwell Park* estate, are respectively improvements authorized by the *Settled Land Acts*, 1882 and 1890. Alternatively, that it may be ascertained and declared which of the improvements and works specified in the said schemes are improvements authorized by the *Settled Land Acts*." Mr. Justice *Chitty* has made an order to this effect: "This Court being of opinion that none of the improvements and works specified in the said two schemes are improvements authorized by the *Settled Land Acts*, or which ought to be paid for out of capital moneys, doth order the said summons do stand dismissed," and he directed that the trustees should take their costs out of the capital moneys. The tenant for life has appealed from that order, and we are asked to say that if all the improvements and alterations suggested are not within the *Settled Land Acts*, some of them, at all events, are.

In order to deal with that we must see what the scheme is. [His Lordship stated the proposals in the scheme, as mentioned above, and proceeded:—]

The first question is upon the true construction of the *Settled Land Acts*, and I proceed at once with the construction contended for by the counsel for the Appellant, which lies at the root of nine-tenths of the arguments in this case. Their argument is that the decisions upon the *Lands Clauses Act*, of which *Drake* v. *Trefusis* (1) may be taken as a type, are decisions to be applied to clause vii. of sect. 21 of the *Settled Land Act*, 1882. In order to dispose of that argument it is necessary to look at the *Settled Land Act* itself; and the *Settled Land Act* of 1882, together with the Acts which have been since passed to amend it, notably the Act of 1890, form really a code applicable to the subject-matter with which those Acts deal. Looking at the scheme of the *Settled Land Act*, 1882, and especially at sects. 21 and 25, it appears to me that it would be a distinct mistake to apply to clause vii. of sect. 21 the construction which

(1) Law Rep. 10 Ch. 364.

C. A
1893
In re LORD GERARD'S SETTLED ESTATE
Lindley, L. J

has been put upon similar words in another Act of Parliament having totally different objects. Sect. 21 of the Act of 1882 says: "Capital money arising under this Act, subject to payment of claims properly payable thereout," and so on, "shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes." Then we come to a string of modes, including investment on Government securities, the discharge, purchase, or redemption of incumbrances, "any improvement authorized by this Act" which refers us to sects. 25 & 26, payment for equality of exchange, purchase of the seignory, and purchase of the reversion. Then comes clause vii.: "In purchase of land in fee simple, and of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase." Then follow clauses enabling it to be laid out in the purchase of annuities, in payment to any person being absolutely entitled, in payment of costs, and in any other mode in which money produced by the exercise of a power of sale in the settlement is applicable. There we have an enumeration of the purposes for which capital money may be applied, and, having regard to that enumeration and to the enlargement of it in sects. 25 and 26, I cannot construe clause vii. as including matters which the Court has held may be included under the *Lands Clauses Act.* We are not dealing with the *Lands Clauses Act*; it is not a code addressed to the same subject-matter as the *Settled Land Act,* and although the Court has seen its way under the *Lands Clauses Act* to allow money paid into Court under that Act or taken under a special Act of Parliament to be employed in erecting new buildings, and not in improvements, it appears to me that to hold that we may incorporate that line of cases into clause vii. of sect. 21 is inconsistent with what is enacted in sect. 25. If that line of cases is to be so applied there would be no use whatever in having enumerated in sect. 25 such objects as building cottages for labourers, farmhouses, saw-mills, and other things of that kind. When you look at it as a whole you must treat it as a whole, and not bring into this Act of Parliament authorities upon other Acts of Parliament which were passed, as I have said, for different purposes altogether. We must therefore

look at the *Settled Land Act* itself to see which of these improvements or alterations are authorized.

Without going through them at any length I may at once dispose of them by heads. First of all, take the mansion-house. The present owner thinks that he has an ugly house, as I daresay it is, and he wants to get a handsome house. It is a natural thing for him to do; but, when he is seeking to do it out of money which is not his own, he must shew the authority for so doing it. We are driven, therefore, naturally and necessarily, upon the sections in the various *Settled Land Acts*; and, when we examine those sections, we cannot find anything which goes the length of authorizing the expenditure of capital money simply in beautifying an ugly house. It is not to be found there, and we cannot sanction it. That disposes of a good many of the items. The same observation really applies to the chapel—there is nothing which authorizes us to allow the expenditure of capital money in the erection of that chapel, and if the tenant for life wants a chapel he must pay for it himself.

As regards the agent's house, precisely the same observations apply. We have been referred to the authority of *In re Houghton Estate* (1), where Vice-Chancellor *Bacon* thought he might authorize such an application of capital money. I rather gather from the argument addressed to the Vice-Chancellor by Mr. *Marten* that the agent's house in that case was a farmhouse in which the agent lived, because he put it that it might come under clause xi. of sect. 25: "Farmhouses, offices, and outbuildings, and other buildings for farm purposes"; and the Vice-Chancellor seems to have thought so too. Of course, if that were so—if the agent's house was a farmhouse in which the agent was living—there is no difficulty about it; but if the agent's house in that case was what the agent's house in this case is to be—if the Vice-Chancellor meant to go that length—then I cannot say that his decision is in conformity with the Act of Parliament. I cannot find the building a new agent's house in any of the sub-sections of the Act which is before us.

There remain the stables. The argument as to the stables is extremely ingenious. There is nothing about stables in the Act

(1) 30 Ch. D. 102.

C. A
1893
In re LORD GERARD'S SETTLED ESTATE.
Lindley, L.J.

of Parliament. If stables are to be got in at all they must be got in under such general words as buildings, outbuildings, or something of that kind. It is said that this £6500 for new stables can be authorized not so much under the Act of 1882—there seems to be confessedly a difficulty in getting them under that Act—but under the enlarged section, sect. 13 of the *Settled Land Act*, 1890. Sect. 13 of the Act of 1890 undoubtedly enlarges sect. 25 of the Act of 1882, and it adds certain things which may be done, viz. "(i.) Bridges; (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." I think that might justify the expenditure of capital moneys in additions or alterations in stables if such additions or alterations were reasonably necessary or proper to enable the same to be let. But then I also agree with the view which has been taken by the Courts of First Instance in other cases, that where there is no question of letting, you cannot spend capital for such purposes. Here Lord *Gerard* is not going to let this property, he is going to inhabit it himself; and I cannot differ from the construction put upon that sub-clause ii. in *In re De Teissier's Settled Estates* (1) by Mr. Justice *Chitty*, in which he says that there must be a present intention to let, if not an immediate prospect of letting, before any application under sub-sect. ii. can be properly made. I think that is a perfectly right and proper construction to be placed upon that particular clause. Then we come to sub-sect. iv., which is: "The rebuilding of the principal mansion-house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land." It is argued that, although nothing is said about stables, the stables are part of the principal mansion-house; and then it is argued that the stables being part of the principal mansion-house, you may spend anything up to the statutory limit in rebuilding the stables. Whether stables can or cannot be regarded as part of the principal mansion-house is a question of fact in each particular case. In some cases I think they can. In some cases I am clear they cannot. All stables cannot be regarded as part of the principal mansion-house—

(1) [1893] 1 Ch. 153, 159.

that is perfectly obvious. On the other hand, stables may be so connected with it, not merely physically, but by occupation, enjoyment and propinquity, as to fall within the expression "rebuilding the principal mansion-house." In this particular case it may be that the old stables were so used for the purposes of the mansion-house and were so near to it that they could be fairly regarded as part of the principal mansion-house.

But what is the scope of sub-sect. iv.? It is the rebuilding of the principal mansion-house. Could you justify the expenditure of capital moneys in rebuilding the principal mansion which is pulled down simply because it is ugly and rebuilt to suit the tenant for life? I think not. That is really the case with regard to these stables. These stables are old stables They are very good except that they want better ventilation and better draining. They are not out of repair. They are not destroyed, but the tenant for life wants to make a magnificent house, and does not want to have ugly stables, and this necessity for pulling down these stables is a piece of artistic fancy. I cannot bring myself to hold that that is a rebuilding of the principal mansion-house within the true meaning of this sub-section. Even assuming that if these stables had been burnt, or had been in a ruinous condition, capital moneys might have been spent on rebuilding them within the sub-sect. iv., I am not prepared to hold that it would be right for us to sanction this outlay on stables with which there is no real fault to find except that they are old-fashioned and ugly.

The view that has been taken by Mr. Justice *Chitty* is correct. The point about the *Lands Clauses Act* is important, and therefore I have dealt with it at some length. The appeal must be dismissed.

LOPES, L.J.:—

I am of the same opinion. With regard to the point that has been made in respect to the *Lands Clauses Act*, the answer to that point is an ample one, and it is this, that this application which we are now dealing with is made under the *Settled Land Acts*, and not under the *Lands Clauses Act*. Therefore it seems to me that the authorities which have been cited to us which

C A
1893
In re
LORD GERARD'S SETTLED ESTATE
Lopes, L J

have reference to the *Lands Clauses Act* have no application in the present case.

As I have said, this is an application which is made to us under the *Settled Land Acts*, 1882 and 1890, and those Acts contain a most complete and exhaustive code of the different things in respect of which capital money may be applied for improvements. That code is specific. It is as particularly and carefully drawn as any code for such a purpose could well be. Now speaking generally of that code (I am speaking for myself) I think that all the improvements authorized under the code were intended by the legislature to be improvements which were calculated to render the settled land more remunerative. I think the legislature thought the capital money under this Act was to be employed only in improvements calculated to increase or to maintain the income of the settled land, and the more carefully that code is examined the more clear it will be that such was the intention of the legislature. I do not think that the legislature intended that the capital money was to be employed in respect of matters which I will describe as mere amenities, matters of mere luxury—not, for instance, in the indulgence of architectural taste, and many of the things in this case really may be summarised under matters involving architectural taste. If I am correct in that view, it disposes of several of the things in respect of which capital moneys are sought to be applied here. It disposes, for instance, of the chapel; it disposes of the towers, it disposes of the wings, and it disposes of the vestibule, for to my mind those are all matters of architectural amenity.

However, there are two other matters which cannot be so easily brought within that head. These are the agent's house and the stables. With regard to the agent's house, I ask myself the question, Is that an improvement which is authorized in that code? I look carefully through the code contained in sect. 25 of the Act of 1882, and then to the supplemental code contained in the Act of 1890, sect. 13, and I can find no words in either of those sections which would include the agent's house. An endeavour is made to bring the agent's house within sub-sect. x. of sect. 25 of the Act of 1882, and I

feel that if the agent's house can be brought under any words it is under the words contained in that sub-section. The words are, "Cottages for labourers, farm servants, and artisans, employed on the settled land or not." Now an agent is not a labourer, nor is he a farm servant, nor is he an artisan; therefore, he is clearly excluded under that sub-section.

But then we are met with *In re Houghton Estate* (1), which has been referred to, a judgment of Vice-Chancellor *Bacon*, and at first sight I was much impressed by that case, but the case when carefully examined may be explained in the way in which Lord Justice *Lindley* has explained it, namely, that it was regarded as the case of a farmhouse. If that is correct it would then come under sub-sect. xi.: "Farmhouses, offices, and outbuildings, and other buildings for farm purposes," and there would be no difficulty in bringing it within the code. But I am not at all clear myself after reading the judgment of the Vice-Chancellor, whether he was not, if I may respectfully say so, somewhat confused between the position of an agent and the position of a farm bailiff. If he thought the agent's house in question was the house of a farm bailiff, then I think it might be brought within the term "farm servants" contained in sub-sect. x., but an agent to my mind is a very different person from that, and when you look at the house which it is sought to have built in this case for the agent, the description of the house itself leads one to the conclusion that a farm bailiff is not intended, but some very superior person to that, because you find that the house is to contain two sitting-rooms, five bed-rooms, and a bath-room. I do not think that you would supply a bath-room for a farm bailiff. My view, therefore, of that case is that either the learned Vice-Chancellor thought he was dealing with that which was practically a farmhouse, or otherwise that the person for whom that house was intended, was not so much in the character of an agent such as the person would be whom Lord *Gerard* would appoint, but rather in the character of a farm bailiff. However, I cannot think for one moment that the agent's house can be brought in any way within the code contained in either of these Acts of Parliament.

(1) 30 Ch. D. 102.

C. A.
1893
In re LORD GERARD'S SETTLED ESTATE.
LOPES, L.J.

The stables stand on entirely different ground. It is perfectly clear to my mind that the stables cannot in any possibility be brought within any of the terms or the words contained in sect. 25 of the Act of 1882. I do not think it is pretended that they can. But then recourse was had to the supplemental code contained in the Act of 1890, sect. 13, and an endeavour was made to bring it within sub-sect. ii. of that section: "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." It is clear to my mind that that will not do. There is the case of *In re De Teissier's Settled Estates* (1), in which case Mr. Justice *Chitty* held that the meaning of that section was this, that the thing in question must at the time be in contemplation to be let. The words he used are these (2): "This is not the kind of case that sub-section was intended to provide for. It often happens that trustees have on their hands an old house, which they come and tell me they cannot let because it has no billiard-room, or is without certain conveniences, which all tenants, according to modern ideas, would insist upon. Additions and alterations such as these I usually consider proper, and allow under this sub-sect. ii.; but before this section can apply, there must be an actual letting in contemplation. In the present case, the tenant for life proposes to occupy the house, and some of the proposed repairs and alterations are already done, and the money spent." All those latter words in that sentence apply to the case here. In this case the tenant for life intends to occupy the house and stables himself, and here too, as I understand, a very large proportion of these alterations have been already made, and the money expended upon them. Therefore, according to my view, the stables cannot be brought within sub-sect. ii. of sect. 13 of the Act of 1890.

But then Mr. *Byrne* says, he brings it in under sub-sect. iv. of sect. 13 of the Act of 1890. The words are these: "The rebuilding of the principal mansion-house on the settled land." Several points arise under those words which it is not necessary to decide in this case. It may be, and probably would be, that stables in certain cases would be held to be part of the

(1) [1893] 1 Ch. 153. (2) [1893] 1 Ch. 156.

principal mansion-house when they are near the house, and practically amount to a necessary adjunct to the house. On the other hand, there may be hunting stables at some distance off, which I think would not be held to be part of the principal mansion-house; and I am inclined to concur in what has already been said in that respect, that, as to whether the stables are part or not part of the principal mansion-house must in each case depend on the particular circumstances. But the words on which I rely are these: "The rebuilding of the principal mansion-house on the settled land." I ask myself the question: "Is this a rebuilding?" and I say, distinctly, "It is not." What was the state of things before Lord *Gerard* pulled down these stables, as no doubt he was entitled to do being a tenant for life without impeachment of waste? It is not suggested that they were not in excellent repair. It is said that they were old, that they were primitive; that they were unsuitable, and may be more or less uncomfortable. It is also alleged that they were not so well drained as they should be, and not so well ventilated as they should be; but the structure, as I understand, was good and substantial. But, even assuming that in this case they may be held to be part of the principal mansion-house, I cannot for one moment think that the Legislature ever intended, simply and solely because old stables that were in good and substantial repair did not altogether suit the requirements and fancies of any particular tenant for life—that on that account a pulling down and rebuilding was to be authorized by this Act. Therefore, I come to the conclusion that, neither this agent's house nor the stables are matters in respect of which those provisions of those Acts to which I have referred ought to be applied.

There is only one other observation that I desire to make, and it was made by Mr. Justice *Chitty*, that is, with regard to sect. 53 of the Act of 1882. The section is familiar; but I had better just call attention to the terms of it, because I think it is not immaterial: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Now, as I understand

C A
1893
In re LORD GERARD'S SETTLED ESTATE
Lopes, L.J.

the authorities, the interpretation to be put on that section is this, that while it does not impose upon the tenant for life the rights of a trustee, it does, more or less, impose upon him the responsibilities of a trustee. If that is so, what I ask myself is, if the capital money which is sought in this case to be applied for the purposes which have been brought to our notice were so applied, whether or not it might not be justly said that it would be a breach of trust on the part of the trustee if he so applied trust-money.

On the whole, I am clearly of opinion that the judgment of Mr. Justice *Chitty* was right.

A. L. SMITH, L.J.:—

In this case, Lord *Gerard* has, within a recent period, purchased *Eastwell Park*, for which he gave £198,000, borrowing the principal part of the money upon mortgage. He found a house, which, although old, was a house which the Duke and Duchess of *Edinburgh* and their family had recently taken on lease, and resided in for some five or six years. It is not suggested that since the Duke left the house has been burnt, or that it has suffered any great dilapidations; but Lord *Gerard* having bought this house, for his own whim and fancy, thought fit to improve and modernize it, and commenced by laying out for that purpose upon it upwards of £30,000. He now comes to this Court to be allowed to apply capital moneys which are in settlement, to carry on these operations to the amount of some £18,000 more, and the question is whether, for these purposes and in these circumstances, this Court should allow what he asks.

In the first place I wish to state that my own opinion is that it is not the right way to construe an Act of Parliament passed in 1882 for a specific purpose, and which constitutes a code by itself, to go back to an Act which was passed forty years before for another purpose altogether, such as the *Lands Clauses Consolidation Act*.

By sub-sects. vii. and viii. of sect. 21 of the Act of 1882, investments may be made of capital moneys in the purchase of land and in the purchase of mines and minerals; but this, in my opinion, particularly when the subsequent legislation is taken

into consideration, does not authorize the investment of such moneys in building houses, unless they belong to the two classes of houses mentioned in sect. 25 of the Act of 1882, or in sect. 13 of the Act of 1890. Sect. 25, as it seems to me, deals with the improvement and protection of the estate.

I next come to sub-sects. x. and xi., and the case in which Vice-Chancellor *Bacon* decided that within this sect. 25 is to be found an authority to build an agent's house with capital moneys. On whatever ground it was that the learned Vice-Chancellor decided that case, I cannot myself see that an agent's house comes within this section. What sub-sect. x. deals with is "Cottages for labourers, farm servants, and artisans, employed on the settled land or not." That is not an agent's house. The cottages are limited to the purposes for which they are to be built. Then sub-sect. xi. is, "Farmhouses, offices, and outbuildings, and other buildings for farm purposes"—that is, not an agent's house. There is no other sub-section in this sect. 25 which deals at all with the building of either cottages or farmhouses or houses; I think that the agent's house does not come within it.

I pass on to the next Act—the Act of 1890. It is said that sub-sect. ii. of sect. 13 would apply to the agent's house. What does sub-sect. ii. say? It is only "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." In my judgment, unless there is a present intention for a letting which does not exist in this case, sub-sect. ii. does not apply.

I now come to the rebuilding of the stables and to sub-sect. iv. of sect. 13, which is: "The rebuilding of the principal mansion-house on the settled land." I think that that may be read, "The rebuilding of the principal mansion-house or part of the principal mansion-house on the estate;" by that I mean, assuming a wing was burnt down or assuming a part was blown down by storm or tempest, I should think it would be a wrong construction to put on this sub-section that, unless it was all blown down or all burnt, you could not apply capital money to the parts which were. I think you may read it thus, "The rebuilding of the principal mansion-house or part of the principal mansion-house on the settled land."

C A
1893
In re LORD GERARD'S SETTLED ESTATE
A L. Smith, L J.

Then are these stables part of the principal mansion-house? for that is the only way in which the stables claim can be dragged in. There may be stables which are part of the principal mansion-house, and there may be stables which are clearly not part of the principal mansion-house, and I will take it in this case that these stables which are in propinquity to the principal mansion-house may be taken as part of the principal mansion-house. But, in the circumstances of this case, is there any necessity for rebuilding the stables, as there must be for rebuilding of the principal mansion-house, or part of it, to get it within sub-sect. iv.? In my judgment of the facts there is not. The stables are not burnt, they are not in decay, they are of adequate size, and all that is wanted to be done is to modernize and embellish them in the same way as the mansion. The stables have only become antiquated because the house is to be made up to date. It is not argued that what Lord *Gerard* is doing to the mansion-house would come within the section, and, in my opinion, what he is doing to the stables does not come within it.

I wish to make one more remark on sub-sect. iv. The words are, "The rebuilding of the principal mansion-house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land." I think (I am only speaking for myself) that the settled land there is not confined to the *Eastwell* estate, but it is all the settled land which is in the settlement upon the same trusts. I agree that in this case you would have to add together the value of the *Lancashire* estate and the *Eastwell* estate to get at the annual rental of the settled land. I think the appeal should be dismissed.

LINDLEY, L.J.:—

I do not at all differ from the last observation of my learned brother. I think it is right.

LOPES, L.J.:—

I also say that I do not differ—I said nothing about it because I did not think it was necessary for this case.

Solicitors for all parties: *Meynell & Pemberton.*

M. W.

In re HETLING AND MERTON'S CONTRACT.

C. A.
1893
KEKEWICH, J.
April 28.
C. A.
June 19, 30.

[1893 H. 828.]

Vendor and Purchaser—Trustee Vendor—Absent Trustee—Solicitor—Attorney—Conditions of Sale—Interest—"Wilful Default"—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 56—*Trustee Act,* 1888 (51 & 52 *Vict. c.* 59), *s.* 2, *sub-s.* 1.

On the 14th of September, 1892, vendors contracted to sell a piece of freehold land subject to the condition, that "if from any cause whatever other than the wilful default of the vendors" the purchase should not be completed by the day fixed for completion, the purchaser should pay interest on the purchase-money until completion.

The property was subject to a mortgage to two trustees, one of whom, *P.*, a solicitor, had gone abroad before the date of the contract, having given to his partner a general power of attorney, authorizing him to execute deeds and transfer any property held by *P.* as trustee or mortgagee. The vendors knew that it would be difficult to communicate with *P.*, but, relying on the sufficiency of the power of attorney, they fixed the 10th of November, 1892, for the completion of the purchase.

The purchaser, however, declined to complete without a conveyance from *P.* himself, alleging that, notwithstanding sect. 2 of the *Trustee Act,* 1888, there was no person to whom the mortgage money could safely be paid. A conveyance from *P.* was ultimately obtained; but owing to the delay thus caused the purchase was not completed until the 1st of March, 1893, and the vendors claimed interest on the purchase-money from the 10th of November, 1892:—

Held, by the Court of Appeal (affirming the decision of *Kekewich,* J.), (1.) that the case was not within sect. 2 of the *Trustee Act,* 1888, and that the purchaser was justified in refusing to complete without a release from *P.*; and (2.) that the delay in completion was attributable to the wilful default of the vendors, and that they were not entitled to any interest on the purchase-money.

APPEAL from Mr. Justice *Kekewich.*

By a contract in writing, dated the 14th of September, 1892, the trustees of a voluntary settlement made in 1889 agreed, with the concurrence of the settlor and his wife, the tenant for life, to sell to *Zachary Merton* a freehold estate, the subject of the settlement, for £8000, subject to certain conditions of sale. On signing the contract the purchaser paid a deposit of £800.

The conditions of sale fixed the 10th of November, 1892, for the completion of the contract, and the 6th condition provided

C A
1893
In re
HETLING AND MERTON'S CONTRACT

that, "If from any cause whatever, other than the wilful default of the vendors," the purchase should not be completed by that day, the purchaser should pay interest at 5 per cent. per annum on the remainder of his purchase-money from that day until the purchase should be completed.

The vendors delivered their abstract of title on the 26th of September, 1892. The purchaser then discovered that the trustees could not make a title themselves, not having any power of sale, and that the property was subject to two mortgages. He accordingly required that the mortgagees, and also the settlor, together with his wife, the tenant for life, should concur in the conveyance.

No difficulty arose as to the first mortgage. The second mortgage was for a sum of £974, being trust money lent by the mortgagees, *Richard Petch* and *Frederick Thomas Hetling* (who was one of the vendors), as trustees. *Petch*, who was a solicitor, was, at the date of the contract and at the present time, residing abroad, and was known to the vendors to be difficult to communicate with; but before he left this country he had executed a power of attorney in general terms appointing his former partner, Mr. *Smurthwaite*, his attorney, and authorizing him in the fullest way to execute deeds and to transfer property held by him, *Petch*, as mortgagee, trustee, or otherwise. The vendors' solicitors knew this before the contract was entered into, and they relied on this power of attorney to overcome any difficulty which *Petch's* absence abroad might occasion. However, when it was proposed that *Smurthwaite*, as such attorney, should execute the conveyance on *Petch's* behalf, the purchaser objected, and declined to complete the purchase without a conveyance from *Petch* himself, alleging that, notwithstanding sect. 2 of the *Trustee Act*, 1888, there was no person to whom the amount due on the second mortgage could safely be paid.

The conveyance was accordingly sent out to *Petch* for execution by himself personally.

The difficulty and delay in communicating with *Petch* and procuring his execution of the conveyance, and also the fact of many of the title deeds being in the hands of the mortgagees or their solicitors, rendered it impossible to complete by the 10th

of November, 1892, and it was not until the 21st of February, 1893, that the vendors' solicitors wrote to the purchaser's solicitors that they were in a position to complete, having obtained the execution of the conveyance by all parties, including *Petch*. The purchase was ultimately completed on the 1st of March, 1893, though without prejudice to a claim made by the vendors, but resisted by the purchaser, for interest, under the 6th condition, on the balance of purchase-money from the 10th of November, 1892.

As the vendors insisted on their right to interest, the purchaser applied by originating summons under the *Vendor and Purchaser Act*, 1874, for a declaration that, under the circumstances, he was not liable to pay interest. On the summons coming before Mr. Justice *Kekewich*, in Chambers, he made an order in favour of the purchaser and directed the vendors to pay the costs of the application.

The vendors now moved to discharge that order, and for an order on the purchaser to pay interest as claimed.

It appeared from the evidence that the property which was the subject of the purchase produced no income, and that the purchaser had his money ready upon the day fixed for the completion of the contract, and kept it ready without receiving any interest upon it.

The motion was heard before Mr. Justice *Kekewich* on the 28th of April, 1893.

Blakesley, for the vendors:—

By sect. 56 of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), it was enacted that the production of a conveyance by a solicitor, the conveyance containing a receipt and being executed by the person entitled to give a receipt for the consideration money, was a sufficient authority to the person liable to pay. But in *In re Bellamy and Metropolitan Board of Works* (1) it was held that the section did not apply to a case where the vendor was a trustee. Accordingly, by sect. 2, subsect. 1, of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59) (2), it was

(1) 24 Ch. D. 387.

(2) Sect. 56 of the *Conveyancing and Law of Property Act*, 1881, is as follows. "Where a solicitor produces

C. A.
1893
In re
HETLING AND MERTON'S CONTRACT.

enacted that a trustee might appoint a solicitor as his agent to receive and give a discharge for any money receivable by such trustee under the trust by permitting the solicitor to produce a deed containing such a receipt as was mentioned in sect. 56 of the Act of 1881. I submit that, under that section, the production of a deed executed by the trustee's attorney, and sufficient in other respects, implies an authority to the attorney to receive the money, and that accordingly the purchaser in the present case was not justified in requiring personal execution of the conveyance by *Petch*, the absent trustee vendor.

That being so, the delay, or the greater part of the delay, in completion by the appointed day, has been due to the purchaser and not to the vendors. No doubt it was, under the various circumstances of the case, impossible to complete by that day; but the fact of an impossible day being fixed does not imply "wilful default" on the part of the vendor, so as to exempt the purchaser from interest under the rule established by *Sherwin* v. *Shakspear* (1); *Sugden's* Vendors and Purchasers (2). The purchaser is only entitled to claim exemption where the delay arises from the spontaneous act of the vendor, as where a vendor

a deed, having in the body thereof or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf, from the person who executed or signed the deed or receipt."

Sect. 2, sub-sect. 1, of the *Trustee Act*, 1888, is, so far as material, as follows: "It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the *Conveyancing and Law of Property Act*, 1881; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee."

(1) 5 D. M. & G. 517.

(2) 14th Ed. p. 637.

left town two days before the day fixed for completion and without leaving any address: *In re Young and Harston's Contract* (1).

G. Cave, for the purchaser, was not called upon.

KEKEWICH, J.:—

The question in this case is, whether the purchaser is liable to pay interest on the balance of his purchase-money under the 6th condition from the date fixed by the contract for the completion, or whether he is absolved from that by the exception introduced into that condition by the words "other than the wilful default of the vendors." According to that condition the purchaser is to pay interest if, from any cause whatever other than the wilful default of the vendors, the purchase shall not be completed on the fixed day.

Now, I have to consider, first, whether there has been default on the part of the vendors; and, secondly, whether the default, if any, has been wilful. There is no occasion for me to attempt a definition either of "wilful default" or of "wilful" as applied to such a subject as this; nor is it necessary to attempt to explain what "default" is. That I think may be taken now to go without saying. As regards "wilful," there is a definition given in the case cited by Mr. *Blakesley* of *In re Young and Harston's Contract* which is sufficient for my purpose. It is this, that if the completion of the contract is postponed beyond the day named, by default of the vendor for which he is responsible, regarding him as a free agent, then that is wilful default on his part, and such an exception as this applies in favour of the purchaser.

What occurred here may be shortly stated as follows. A day having been appointed for the completion of the purchase, that day having long since passed, the purchase was ultimately completed on the 1st of March, 1893. It is possible that the day of completion would not have been observed for other reasons, but the purchase could not be completed then because the execution of the deed by one necessary party not only was not

(1) 31 Ch. D. 168, 173.

C. A.
1893
In re
HETLING AND MERTON'S CONTRACT
Kekewich, J.

obtained, but could not have been obtained by that time—a fact which must be taken to have been known to the vendors when they executed the contract. Nor is there any doubt suggested that the contract was ultimately completed—that is to say, the deed was handed over properly executed—on as early a day as, having regard to all the circumstances, could be expected; these circumstances, however, including the delay of the vendors to do what was necessary towards an earlier completion. The property was in mortgage, and the vendors, of course, in order to make a good title, to the purchase, had to procure the concurrence of the mortgagees, one of whom was residing out of the country. Therefore, I have not here precisely the same case as that of *In re Young and Harston's Contract* (1), where one of the vendors left town when by staying he might have facilitated the purchase; but I have here the residence of a mortgagee abroad, and the necessity, if his personal execution of the deed was required, of communicating with him abroad, which must necessarily occupy a considerable time, so much time, in fact, that the completion on the day named was impossible—a fact which must be taken to have been in the knowledge of the vendors, although, possibly, they did not take the pains to assure themselves of it. Lord Justice *Fry*, in his judgment in the case to which I have referred, recognises the duty of the vendors to obtain the execution by the mortgagees, and he implies that they might be—in fact, he says in his view they were—guilty of wilful default in the performance of that duty. Therefore, I have high authority for holding that a vendor may be guilty of wilful default in not obtaining the concurrence of a mortgagee in the execution of the deed. The purchaser required that the mortgagee should execute the deed, but he was content that an attorney acting under a power which I have not seen (and which I take for granted is an ordinary power of attorney) should execute it, and that that would be sufficient. But what he said was that, although the attorney might execute the deed and perform that ministerial act as attorney, he could not give a receipt for the mortgage trust money in that way, and he, the purchaser, must have the personal authority of the mortgagee trustee for

(1) 31 Ch. D. 168.

the payment of the money to his attorney. It is on the answer to that that the question of law depends. The vendors say, "We will produce the deed to you, the purchaser, executed by the mortgagee trustee by his attorney, and in so producing the deed we shall be his agents to receive the money, and that will be a discharge." It clearly would not have been so before the *Conveyancing Act*, 1881, for it was held in *Viney* v. *Chaplin* (1) that a purchaser was entitled to insist on paying the money to the vendor himself. The 56th section of the Act of 1881 gets rid of that, and provides that, where a solicitor produces a deed having, in the body thereof or indorsed upon it, a receipt, the deed being properly executed, then that is a sufficient authority for the paymant of the money to the solicitor. What is meant by the solicitor producing a deed within that section has been under the consideration of Mr. Justice *North* in *Day* v. *Woolwich Equitable Building Society* (2), and his view of the section was that the solicitor producing the deed must be a solicitor acting for the party to whom the money is expressed to be paid. The learned Judge says this: "In my opinion that refers to a solicitor acting in some way for the party sought to be charged, and does not mean that where a mortgagor has no solicitor acting for him, the solicitor of the mortgagee can, by producing the deed to the mortgagee, give a discharge on the mortgagor's behalf." That was Mr. Justice *North's* view, as it is mine. The solicitor producing the deed under the 56th section is the solicitor who is acting for the person whose deed is produced. It is on that section the vendors rely, and they say that the production of the deed would be a sufficient authority to pay the solicitor.

It was held, however, by the Court of Appeal in *In re Bellamy and Metropolitan Board of Works* (3)—a decision that has been followed in other cases—that the section did not apply to a trustee vendor. The point was very carefully considered by the Court of Appeal in that case. Lord Justice *Baggallay* took a different view, but the majority of the Court were in favour of not applying the 56th section of the *Conveyancing Act*, 1881, to a trustee vendor. They said that, in the case of a trustee vendor,

(1) 2 De G. & J. 468. (2) 40 Ch. D. 491.
(3) 24 Ch. D. 387.

C. A.
1893
In re HETLING AND MERTON'S CONTRACT.
Kekewich, J.

the law still held good that the purchaser was bound to see that the vendor received the money and that the money came to the hand of the vendor, and that the purchaser was not authorized to pay the vendor's solicitor without special authority—that is to say, that the mere production of the deed was not sufficient. That decision was considered by the Legislature not to give full effect to what was really intended by the *Conveyancing Act*, and thereupon a further enactment was made by the 2nd section of the *Trustee Act*, 1888, which is in these terms: "It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the 56th section of the *Conveyancing and Law of Property Act*, 1881." The result is, that if a purchaser pays the money to the solicitor under such a condition, that is a good discharge to him, and therefore is all he can reasonably require as a good discharge, and he cannot ask for more.

Then it is said that that provision goes as far as this—that the absent trustee may appoint an attorney to execute the deed; that the attorney may appoint a solicitor, and that the solicitor may produce the deed executed by the trustee by the hand of his attorney, and then give a discharge for the purchase-money. That is not a fair construction of the *Trustee Act*, 1888, in my opinion. I do not believe that it entered into the mind of the person who drafted the Act that this result would follow, because, as I pointed out during the argument, it implies that an absent trustee who has merely authorized some person to execute the deed for him may be held liable for the purchase-money, of which he has never heard, and which has only been paid under the authority of this section to a solicitor on the appointment of an attorney. It is, as Mr. *Blakesley* himself admitted, a double delegation, going far beyond what is necessary for the transaction of business, and imposing, as I regard it, additional hardship on trustees through an Act which was intended to relieve them of liability, and I do not think it would be right to construe an Act so largely when nothing of the kind is

required, and when, as I understand the previous law, the defect of that law did not involve in its remedy such a considerable alteration. I do not think this section means that a trustee, merely by authorizing a man to execute a deed as an attorney, is to be held to authorize that attorney to appoint a solicitor to receive the money, not on his, the attorney's, behalf, but on the trustee's behalf, so that the trustee shall be responsible.

The vendors have been required to obtain the execution of the deed by the absent trustee. I think they must be taken to have known that would be ultimately necessary, and, at any rate, the delay in obtaining it was theirs and not the purchaser's, who I think made and insisted on a very proper requisition. For the reasons I have mentioned I think that the delay was the vendors' default—their "wilful default"; and the motion must, therefore, be refused with costs.

G. I. F. C.

C A

The vendors appealed, and the appeal was heard on the 19th of June, 1893.

Chadwyck Healey, Q.C., and *Blakesley*, for the Appellants:—

The learned Judge seems to have considered that the vendors were guilty of a wilful default, which delayed the completion of the purchase, because, knowing that *Petch* was abroad and could not execute the deed by attorney, they allowed too early a day to be fixed for the completion of the purchase—in other words, that they themselves fixed a period for completion within which, as they knew, the execution of the conveyance by a necessary party could not be obtained. But this objection, if it can be taken at all, is one which goes to the contract itself, and cannot be made use of to attack the proceedings under the contract; and, moreover, there is no evidence that the vendors knew as a matter of fact that *Petch* was abroad and could not be communicated with in time.

Assuming, however, that the vendors knew at the date of the contract that *Petch* was abroad, it must still be shewn (1.) that they knew the state of the law, (2) that they intended to do what they did, and (3.) that they were free agents. Even if they knew that completion by the day fixed was impossible, the

C. A.
1893
In re HETLING AND MERTON'S CONTRACT

impossibility did not arise from their own wilful default: *Day* v. *Woolwich Equitable Building Society* (1); *Williams* v. *Glenton* (2); *Oxenden* v. *Lord Falmouth* (3).

There was no wilful default on our side which delayed the purchase; the real cause of the delay was the state of the title. [They also made use of the arguments and cited the authorities mentioned in the report of the hearing before Mr. Justice *Kekewich*.]

G. Cave, for the Respondent:—

The power of attorney given by *Petch* to *Smurthwaite* was not a special power given for the purposes of this transaction, but a mere general power of attorney delegating to him all *Petch's* powers as a trustee, and containing no express power to give receipts for money lent on mortgage. The case does not come within the 2nd section of the Act of 1888, for that section does not apply to general powers, and the purchaser could not safely complete without a conveyance from *Petch* himself. The vendors knew that *Petch* was a trustee; they knew that a conveyance from him could not be procured within the time they fixed for completion; they must be taken to have known the state of the law; and it was "wilful default" on their part. disentitling them to interest, to fix a period for completion within which the purchase could not be completed: *Dart's* Vendors and Purchasers (4); *Sherwin* v. *Shakspear* (5); *Viney* v. *Chaplin* (6); *Fry* v. *Tapson* (7).

But even if this was not wilful default it would be inequitable to force the purchaser to pay interest from a day at which no one could have completed, especially in a case like this, where he had his money ready on the day and kept it without earning interest, and there are no rents accruing on the property out of which to compensate him.

Chadwyck Healey, in reply:—

The power of attorney held by *Smurthwaite* fully empowered

(1) 40 Ch. D. 491.
(2) Law Rep. 1 Ch. 200, 206.
(3) Sug. V. & P. 14th Ed. p. 637.
(4) 6th Ed. p. 724.
(5) 5 D. M. & G. 517.
(6) 2 De G & J. 468.
(7) 28 Ch. D. 268.

him to execute deeds and to transfer property held by *Petch* as mortgagee or trustee. The principal object and effect of sect. 2 of the Act of 1888 was to make sect. 56 of the *Conveyancing Act*, 1881, apply to the case of a trustee, like the present. The mere production by the solicitor of a proper deed is to operate as a good discharge, and a purchaser is not entitled to require proof that the solicitor was authorized to have the custody of and to produce it.

June 30. The judgment of the Court (*Lindley*, *Lopes*, and *A. L. Smith*, L.JJ.) was delivered by

LINDLEY, L.J.:—

This is an appeal by vendors from an order of Mr. Justice *Kekewich*, made on a summons taken out under the *Vendor and Purchaser Act*, and deciding that the purchaser is not bound to pay interest on his purchase-money. [His Lordship then stated the facts of the case, and continued:—]

The liability of the purchaser to pay interest depends upon whether the delay in completion was attributable to the wilful default of the vendors, and this depends (1.) on whether the purchaser could have completed the purchase with safety to himself without procuring a release of the second mortgage executed by *Petch*, and (2.) whether, even if he could not, the delay occasioned by obtaining that release was caused by the wilful default of the vendors.

The first of these questions turns on sect. 2 of the *Trustee Act*, 1888 (51 & 52 Vict. c. 59). This section was passed in order to amend and extend the operation of sect. 56 of the *Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), the utility of which for business purposes had been seriously impaired by the decision of the Court of Appeal in *In re Bellamy and Metropolitan Board of Works* (1). [His Lordship then read sect. 2 of the *Trustee Act*, 1888, and continued:—]

I am not at all disposed to put a narrow construction on this section. It was passed for the protection of trustees and of persons dealing with them; and its obvious intention is to

(1) 24 Ch. D. 387.

C. A.
1893
In re HETLING AND MERTON'S CONTRACT.

facilitate the transaction of business by and with trustees. This is evident from the wording of the section and from the reference to sect. 56 of the *Conveyancing Act*, which protects persons paying money rather than persons receiving it. I have no doubt myself that a trustee can execute a deed by an attorney, and can empower that attorney to receive, or join in receiving, trust money, and that sect. 2 of the *Trustee Act*, 1888, will protect a purchaser in paying money to a person so authorized to act. But the power of attorney executed by *Petch* in 1890 had no reference whatever to this particular transaction, and was, as regards all trust matters, a delegation of his duty to his various *cestuis que trust*. The attorney *Smurthwaite* was not entrusted by *Petch* with any such deed as is referred to in sect. 2 of the *Trustee Act*, 1888, nor could *Smurthwaite* under his general power have given a discharge for the mortgage money, or, by executing a deed in *Petch's* name and handing it to the vendor's solicitor, have authorized him to receive such money. The solicitor to receive the money, under sect. 2 of the *Trustee Act*, 1888, must be appointed by the trustee himself. The trustee must himself permit the production by the solicitor of a deed with a proper receipt clause, in order that such production may have the effect mentioned in the section. It follows from this that if a purchaser were to pay money to a solicitor producing a deed duly executed by a trustee with a proper receipt clause, but it turned out that the solicitor had stolen the deed or had not been permitted by the trustee to have the custody of it and to produce it, the purchaser would not be protected by the section: see *Day* v. *Woolwich Equitable Building Society* (1). At the same time, ordinary business transactions cannot be carried on without some amount of trust; and if a purchaser in an ordinary case were, without reason, to require proof that a solicitor, purporting to act for trustees and producing a proper deed, had their permission to have the custody of it and to produce it, the purchaser would, *primâ facie*, be acting unreasonably and would probably have to pay for his excess of caution. In this case, however, the purchaser knew that the state of things was quite different from that presupposed by the Legis-

(1) 40 Ch. D. 491.

lature when it enacted sect. 2 of the *Trustee Act*, 1888, and his refusal to complete was perfectly justifiable.

I pass now to consider whether the delay caused by the difficulty to which I have alluded was attributable to the wilful default of the vendors. The meaning of "wilful default" in a condition such as that which has to be considered was examined with care in *In re Young and Harston's Contract* (1). Whatever may be the popular meaning of wilful default, whatever the expression may mean in dealing with other matters, it is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor, may all be absent, and yet there may be wilful default on his part disentitling him to interest under a contract such as that before us. If a vendor knows the material facts—knows that there are difficulties which it is his duty to overcome—knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time, although no fresh unforeseen occurrence prevents him from doing so, the delay caused by such failure on his part is attributable to his wilful default in the sense in which that expression is used in contracts of this description; and his right to interest during such delay is excluded. The vendors here knew all the facts; but they hoped that the power of attorney would enable them to remove the difficulty occasioned by the facts with which they were fully acquainted. This hope and the mistake they made are not enough to enable the Court to hold that there was no wilful default on their part. The case is not like *Williams* v. *Glenton* (2), for the contract there was an absolute contract by the petitioner to pay interest whatever the cause of delay might be, and the observations in the judgments had reference to contracts in that unqualified form; however, in that case the Court was satisfied that when the contract was entered into the vendor did not know of the adverse claim which caused the delay (3).

The conclusion thus arrived at is in my opinion not only in accordance with law but is eminently fair and just. The property produced no income; the purchaser had his money ready to complete the purchase at the proper time, and he kept it

(1) 31 Ch. D. 168. (2) Law Rep. 1 Ch. 200.
(3) Law Rep. 1 Ch. 208.

C. A
1893
In re HETLING AND MERTON'S CONTRACT.

ready, making no interest of it. He was, moreover, put to great inconvenience and no little expense in not being able to take possession when he expected. The vendors may also have suffered, for they could not let the property, and they had to pay the interest on the mortgages; but this was entirely their own fault in not adequately providing against difficulties which they foresaw and which it was for them to overcome.

The appeal must be dismissed with costs.

Solicitors: *Carlisle, Unna, & Rider; Busk & Co.*

W. W. K.

C. A.
1893
ROMER, J
March 21, 23, 24; *April* 18.
C A
June 30, *July* 3, 4.

MIDGLEY *v.* MIDGLEY.

[1892 M. 2133.]

Executor—Administration—Debt barred by the Statute of Limitations—Payment against wish of Co-executor—Devastavit—Administration Summons—Res Judicata—Liability of Solicitor.

Although it has been established as a general rule that an executor may pay a debt barred by the *Statute of Limitations* without being guilty of a *devastavit*, he may not pay such a debt after it has been judicially declared by a Court of competent jurisdiction that it is barred by the statute.

Whether an executor may pay a debt barred by the statute against the declared wish of his co-executor, *quære.*

If an action is brought against several executors for the recovery of a debt due to the testator and they plead different inconsistent pleas, that plea is to be enforced by the Court which is most for the benefit of the estate.

An administration summons was taken out by an alleged creditor against two executors, *S.* and *M.* *S.* filed an affidavit stating that the debt was owing, and that he was willing to pay it. *M.*, who was also general legatee, filed an affidavit pleading the *Statute of Limitations.* The Judge decided that the debt was barred by the statute, and dismissed the summons. *S.* then, by the advice of his solicitor, notwithstanding this judgment, paid the debt out of the assets to the solicitor, who paid it to the creditor:—

Held, in an action by *M.* against *S.*, the creditor, and the solicitor (affirming the decision of *Romer*, J.), that *S.* committed a *devastavit* by payment of the debt, and that *S.*, the creditor, and the solicitor were liable to repay the money to the testator's estate.

J. J. MIDGLEY, in November, 1880, borrowed a sum of £150 from *Elizabeth Sager* and *Jane Sager*, who were his aunts. The

money was advanced by Messrs. *Plant & Co.*, solicitors, out of moneys belonging to the Misses *Sager* in their hands. *J. J. Midgley* paid off £50 of the debt before 1885. The last payment of interest on the remaining £100 was made on the 11th of April, 1885, and since that date *J. J. Midgley* made no payment or acknowledgment of the debt.

J. J. Midgley died in October, 1891, having by his will devised and bequeathed all his real and personal estate to his wife, the Plaintiff *Isabella Midgley*, and appointed her and his brother the Defendant *Stephen Midgley* his executors, both of whom proved the will.

Part of the residuary estate of the testator consisted of a sum of £626 5*s.* 6*d.*, standing in the names of the Plaintiff and the Defendant *Stephen Midgley*, as executors, at the *Chorley* branch of the *Lancashire Banking Company*. *Stephen Midgley* gave written instructions to the manager of the bank that no cheques should be honoured unless signed by both executors.

In the month of February, 1892, the Plaintiff, as executrix and general legatee of her husband's will, brought an action against the Misses *Sager* for the recovery of certain trust moneys in their hands belonging to the testator's estate, and obtained an order for the payment to her of £117 15*s.* Messrs. *Plant* acted as solicitors to the Misses *Sager* in that action, and paid the money out of funds in their hands belonging to their clients.

In April, 1892, the Misses *Sager*, acting by the same solicitors, took out an administration summons in the Palatine Court of *Lancaster* against the two executors, claiming payment of the sum of £135 for principal and interest due from the testator's estate. *S. Midgley* put in an affidavit admitting the debt to be due to the Misses *Sager*, and consenting to an immediate order for administration. But the Plaintiff Mrs. *Midgley* made an affidavit pleading that the debt was barred by the *Statute of Limitations*. The District Registrar held that the debt was barred, and that the Misses *Sager* were not creditors of the testator, and on that ground dismissed the summons. The Misses *Sager* presented an appeal to the Vice-Chancellor, but the appeal was withdrawn.

S. Midgley, however, notwithstanding this decision and acting

C. A
1893
MIDGLEY
v.
MIDGLEY.

under the advice of Messrs. *Plant*, revoked the notice which he had given to the *Lancashire Bank* against honouring cheques drawn by one executor only, and drew a cheque for £135, which Mr. *C. H. Plant*, one of the firm, cashed at the bank. The money received by him remained still in his hands at the time when the present action was commenced on account of the Misses *Sager*, but had been since paid to the Misses *Sager*. The facts of the case are referred to in greater detail in the judgment of Mr. Justice *Romer*.

The present action was brought by the Plaintiff against *S. Midgley*, the Misses *Sager*, and Messrs. *Plant*, claiming to make them jointly and severally liable for the sum of £135, as having been obtained by them under a breach of trust.

The action came on for hearing before Mr. Justice *Romer* on the 21st of March, 1893.

Channell, Q.C., and *Upjohn*, for the Plaintiff:—

Under the circumstances this payment was improper and a breach of trust, and the executor who paid it and the solicitor who received it with knowledge of all the circumstances are jointly and severally liable to refund it. Although an executor is not bound to set up the statute and may pay a statute-barred debt, yet he cannot pay such a debt against the wishes of his co-executor who is a beneficiary, especially when the debt has been held in previous legal proceedings to be statute-barred. After the decision in Chambers on the originating summons taken out by the Misses *Sager*, the matter was *res judicata* and a good defence to any claim for the debt: *Thomas* v. *Griffith* (1); *Thompson* v. *Thompson* (2). A promise to pay or an acknowledgment of debt by one executor is not sufficient to take the case out of the statute; it must be the act of both executors: *In re Ingham* (3); *Lepard* v. *Vernon* (4); *Sneesby* v. *Thorne* (5); *Beeching* v. *Morphew* (6); *Tullock* v. *Dunn* (7); *Scholey* v. *Walton* (8). *Stephen Midgley* did not act in good faith. He should have

(1) 2 D. F. & J. 555.
(2) 11 W. R. 797.
(3) [1893] 1 Ch. 352.
(4) 2 V. & B. 51.
(5) 7 D. M. & G. 399.
(6) 8 Hare, 129.
(7) Ry. & Mood. 416.
(8) 12 M. & W. 510.

considered the interests of his testator's estate and not the interests of his brothers and sisters. When executors disagree the test is, what is for the benefit of the testator's estate: *Williams* on Executors (1). As to the Defendant *C. H. Plant*, he was aware of the dispute between the executors and knew all the circumstances from the outset, and was a party to, if he did not plan, the breach of trust, and therefore he cannot escape liability: *Barnes* v. *Addy* (2); *Lee* v. *Sankey* (3); *In re Blundell* (4); *In re Spencer* (5). And the Defendants, the *Sagers*, are in no better position, for they are liable for the acts of their agent *Plant*.

Neville, Q.C., and *Maidlow*, for the Defendant *Stephen Midgley*:—

Executors can pay a statute-barred debt if they choose; and this legal right of the executors can be exercised by any one of them and notwithstanding the dissent of the others—at any rate, in respect of legal assets—and cannot be stopped except by a decree in an action to administer the estate: *In re Radcliffe* (6); *Smith* v. *Everett* (7); *Herbert* v. *Pigott* (8); *Williams* on Executors (9); *In re Rownson* (10); *Lepard* v. *Vernon* (11); *Harris* v. *Harris* (12). The cases cited on the other side do not touch this proposition. Notwithstanding the decision in Chambers the matter was not *res judicata*. That decision was not equivalent to a decree for administration. It only decided as a matter of fact that the debt was statute-barred—that is, that no action could be brought to recover the debt; but that did not prevent *Stephen Midgley* from exercising his legal right as executor to pay a just debt, and therefore his motive in paying it, and whether he acted *bonâ fide*, is immaterial. We have evidence to shew that the debt was justly due.

Channell, Q.C.:—We object to the evidence being received.

[ROMER, J.:—After the decision on the summons, that the debt was statute-barred, I am not going to decide in this action whether the debt was or was not due.]

(1) 8th Ed. vol. ii. p. 1953.
(2) Law Rep. 9 Ch. 244.
(3) Ibid. 15 Eq. 204.
(4) 40 Ch. D. 370.
(5) 51 L. J. (Ch.) 271.
(6) 7 Ch. D. 733.
(7) 27 Beav. 446.
(8) 2 Cr. & M. 384.
(9) 8th Ed. vol. ii. p. 950.
(10) 29 Ch. D. 358.
(11) 2 V. & B. 51.
(12) 35 W. R. 710.

C. A.
1893
MIDGLEY
v.
MIDGLEY.

Hopkinson, Q.C., and *O. L. Clare*, for the Defendants *Plant*:—

Stephen Midgley knew that the money was to be paid over to the *Sagers*, and that *C. H. Plant* was only their agent. *Plant* was a mere conduit pipe and passed on the money to his principals, and therefore he is not personally liable although he knew all the circumstances: *Barnes* v. *Addy* (1); *In re Spencer* (2). There is nothing to prevent an executor being honest if he chooses, and a co-executor has no overriding equity merely because he is also a beneficiary.

Chadwyck Healey, Q.C., and *Swinfen Eady*, for the Misses *Sager*, adopted the arguments of the other Defendants.

Upjohn, in reply.

1893. April 18. ROMER, J.:—

The facts of this case are somewhat peculiar. Mr. *John James Midgley* dies leaving a small estate, having by his will given that estate to his widow for her sole benefit, and appointed her and his brother *Stephen* executors, who proved the will. *Stephen* had therefore no pecuniary interest in the estate. The widow, of course, as sole beneficiary, was greatly interested in protecting it. Now, it appears that the testator had some years before his death borrowed of two aunts, the Misses *Sager*, a small sum of money, and that his mother, who died shortly before the testator, had as surety secured on some property of hers the repayment of that money, and at the testator's death the Misses *Sager* claimed that in respect of the loan by them £135 was due for principal and accumulated interest from the testator's estate. But this claim of the Misses *Sager* was barred by the *Statute of Limitations*.

Now, unfortunately for the widow, her co-executor *Stephen* was, as one of the children of the mother who had died intestate, interested in the mother's estate, and appears to have been apprehensive that if the statute-barred debt was not paid the mother's property charged as security for the debt might be had recourse to by the Misses *Sager*, and so it was to his interest (or he thought it was) that the debt should be paid by his brother

(1) Law Rep. 9 Ch. 244. (2) 51 L. J. (Ch.) 271.

John James Midgley's estate, although that debt was barred by the statute. Now, *Stephen* appears to have been acquainted with the Defendant *Charles Harvey Plant*, a solicitor whose firm acted for the Misses *Sager*, and very soon after her husband's death the widow found herself involved in litigation. The first step on Mr. *Plant's* part, acting zealously in the interests of his clients, was to try and get the widow to sign a written undertaking by her and *Stephen* to pay out of her husband's estate to the representatives of the mother the amount which it was stated in the writing the mother had paid or her estate was liable to pay to the Misses *Sager* in respect of the money borrowed from them. In fact, the mother had not paid anything in respect of the money borrowed, and the widow, having consulted an independent solicitor, refuses to sign the undertaking; but *Stephen* does sign it, although requested by the widow not to do so. The next step is an action in the County Palatine of *Lancaster* for the administration of the testator's estate brought against the widow and *Stephen* by *Amos Midgley*, another brother of the testator, claiming to represent the mother's estate and to be creditor of the testator in respect of the liability of the mother's property to answer as surety the debt to the Misses *Sager*. Mr. *Plant's* firm act as solicitors for *Amos* in that proceeding which was clearly unfounded, as *Amos* was no creditor of the testator. The widow, of course, opposes, and, though *Stephen* does his best to assist *Amos*, the action is dismissed as against the widow with costs. The next litigation arises in this way. The testator was entitled to a share in a trust fund held by the Misses *Sager*, who refuse to pay that share to the testator's estate. So the widow, as executrix of her husband, is obliged to take proceedings in the Chancery Division of the High Court against the Misses *Sager* to recover the share. Mr. *Plant's* firm act as solicitors for the Misses *Sager* in these proceedings, and get an affidavit from *Stephen* opposing the mother's claim on the ground that he is one of the executors of the testator, and objects to the proceedings as being totally unnecessary and not brought *bonâ fide* for the purpose of obtaining just relief. Notwithstanding this, the widow succeeds, and obtains an order for payment of the share with costs. Thereupon further litigation ensues; for the

C. A.
1893
MIDGLEY
v
MIDGLEY
Romer, J

Misses *Sager*, by Mr. *Plant's* firm as solicitors, take out an originating summons in the High Court against the widow and *Stephen*, as Defendants, to administer the testator's estate on the footing that the Misses *Sager* are creditors of the testator in respect of the statute-barred debt. *Stephen* does not oppose, and admits the debt as due; but the widow, of course, opposes, and pleads the *Statute of Limitations*, and the summons is heard and ordered to be dismissed with costs, the reason for the decision being that the debt is statute-barred, and consequently that the Misses *Sager* cannot enforce the debt against the testator's estate. An appeal is brought against this order, but abandoned. After this, one would have thought that the matter was at an end, and the testator's estate fully protected for the benefit of the widow from all further claim by the Misses *Sager* in respect of the debt. Not at all. Mr. *Plant* and *Stephen Mudgley* between them then arrange and carry out the transaction I will now mention, and which gives rise to the action now before me. It appears that some money the proceeds of a policy, part of the testator's estate, had been paid into a bank, and was standing to the credit of the widow and *Stephen* as executors. *Stephen* had given notice to the bank not to honour any cheque on the account, except when signed by both executors, and the widow was, under the circumstances, naturally under the impression that this sum at least was secure to the estate. In this she is mistaken; for Mr. *Plant* gets *Stephen* to sign two documents, one being a withdrawal of his previous notice to the bank not to honour any cheque on the bank unless signed by both executors, and the other being a cheque for £135 in favour of Mr. *Plant* or his firm. Armed with these documents, Mr *Plant* goes to the bank, sees the manager, and serves him with the withdrawal of the previous notice, and then demands payment of the cheque on the ground that, the account being an executor's account, the signature of one executor is sufficient. The manager asks to be at liberty to consult his solicitor, whose office is close to hand; but Mr. *Plant* insists on immediate payment, and the manager (whether rightly or wrongly, I need not now consider) then pays the cheque, and Mr. *Plant*, having received the £135, at once pays it in to his account at his own bank, which he keeps as trustee or agent for

the Misses *Sager*, and there it still remains. Naturally that leads to the present action, brought by the widow as Plaintiff against *Stephen* and the Misses *Sager*, and Mr. *Plant* and his partners as Defendants, in order to have the £135 repaid to the testator's estate.

The Defendants oppose on the ground that *Stephen*, as one of the executors, was entitled to pay the £135 as a debt due to the Misses *Sager*, even though it could not be enforced against the estate by reason of the *Statute of Limitations*, and by their counsel they contended before me that *Stephen* was still entitled to make the payment, notwithstanding the order dismissing the originating summons; for though they admitted that by reason of that order the claim of the Misses *Sager* to be creditors of the testator became *res judicata*, they urged that as the ground for the order was that the claim was barred by the statute, the order left the claim in the same position that it was before, as a claim which one executor was at liberty to pay if he thought fit. In my opinion the last-mentioned contention cannot be supported, and I therefore need not consider the other grounds on which the Plaintiff contends that the transaction impeached was improper. Now, the general rule with regard to the duty of an executor is clear. If he pays that which need not be paid it is a *devastavit*. To this rule there is one exception, in the case of a debt not enforceable by reason of the *Statute of Limitations*; for it has been held that an executor is not bound to plead the *Statute of Limitations*, and may therefore pay a claim when the only defence would be that statute. This exception is an anomaly and ought not to be extended, as was pointed out by Lord Justice *Fry* in the case of *In re Rownson* (1). In that case it was decided that an executor could not pay a creditor who was prevented from enforcing his debt by reason of the *Statute of Frauds*. It is the duty of an executor to plead to a claim where applicable the *Statute of Frauds* and all proper defences with the single exception of the *Statute of Limitations*. Now, in my judgment it would certainly be an extension of the exception if I were to hold that when a claim has been brought before the Court, and the defence of the

(1) 29 Ch. D. 358, 365.

C A
1893
MIDGLEY
v
MIDGLEY
Romer J

Statute of Limitations pleaded successfully, and the claim been adjudicated upon and dismissed, on that ground that one executor might still pay the claim Not one of the reported cases has gone that length, and I will not extend the exception And one consideration alone appears to me to shew in itself that the Defendants' contention is unsound. Suppose the Misses *Sager* after the order dismissing their claim had brought an action against the executors Admit that the executors would not have been bound to plead the *Statute of Limitations* They certainly would have been bound to plead *res judicata*, and indeed that would have been the only proper plea The claim was one to which the plea of *res judicata* was a bar, and that plea is one which forms no exception to the general rule I have before indicated An executor paying a claim adjudicated upon and dismissed would be guilty of a *devastavit*. It follows that the taking of the £135 from the testator's estate was a wrongful act—wrongful to the knowledge of the Defendants *Stephen Midgley* and *C H Plant*, for they were aware of all the facts, and invented and carried out the transaction by which the testator's estate was improperly despoiled Nor is it any defence for them to say that they were under a wrongful impression as to the law, and thought they could lawfully do what they did The Defendant *Stephen Midgley* is clearly liable, but he appears to be a man of little or no means, and his liability is not of much avail to the Plaintiff As to the Defendant *C H Plant*, he not only actively intermeddled in the wrong-doing, but received the £135, part of the testator's estate, by virtue of that wrong-doing, and on this ground he would be liable And the Defendants the Misses *Sager* are in no better position, for they have received and still retain the benefit of the £135 by virtue of the wrongful acts of their agent, Mr. *Plant* Fortunately, perhaps, for some of the Defendants, this part of the testator's estate can still be traced, and is standing (as I have said) to the credit of the Defendant *C. H. Plant*, at his bank, as agent or in trust for the Defendants the Misses *Sager*.

Under these circumstances it appears to me the right order to make will be the following —

Order the Defendants, *C H Plant* and the Misses *Sager*, to repay the £135 to the credit of the executors' account above mentioned. Declare that the

Defendant *Stephen Midgley* is liable for the repayment of the £135 and interest at 4 per cent., and order him to pay that interest to the executors' account. Liberty to apply in Chambers to enforce his liability in respect of the £135, in case for any reason under the order against *C. H. Plant* and the Misses *Sager* the £135 is not fully paid. Then, as this action has been caused by the Defendants *Stephen Midgley* and *C. H. Plant*, I order them to pay the Plaintiff's costs, to be taxed. I make no order as to the costs of the Defendants *H. A. E. Plant* and *A. T. Plant*, or of the Defendants the Misses *Sager*.

Before parting with the action I ought to say a few words on two points. It is suggested that indirectly the testator's estate may still be reached for the £135, because the Misses *Sager* may still realize their security as against the mother's property, and that then the mother's representatives would have a claim for recoupment against the testator's estate. This may or may not be so; but I have nothing to do with it in this action. At present the mother's estate has paid nothing in respect of the £135, and may never pay anything, and possibly (for the point does not arise for decision in the case before me) the mother's estate may not be legally liable to pay any part of the debt in respect of which the principal debtor or his estate is no longer liable. But, however that may be, at present the Misses *Sager* have not, and the mother's representative has not, any enforceable claim against the testator's estate. It was also faintly suggested by counsel for the Defendants that the £135 was due, not to the Misses *Sager*, but to trustees for them, and that the trustees were no party to the originating summons as to which the plea of *res judicata* applies. But throughout the Misses *Sager* have claimed to be and been treated by the Defendants as creditors of the testator in respect of the £135, and, if they were not creditors, then the payment to them of the £135 was clearly improper.

H. L. F.

From this judgment appeals were brought by the Defendants *C. H. Plant*, *S. Midgley*, and the Misses *Sager*.

The appeals came on to be heard on the 30th of June, 1893.

C. A.

Hopkinson, Q.C., and *O. L. Clare*, for the Appellant *C. H. Plant*:—

As between the Plaintiff and *Plant* there is no obligation

C. A.
1893
MIDGLEY
v.
MIDGLEY.

under which the latter can be called upon to pay the £135. *Plant* was a mere agent for the Misses *Sager*, in whose hands the money now is. This is an attempt to make an agent liable as constructive trustee for the Plaintiff as *cestui que trust*—a proposition which, it is well settled, cannot be maintained: *Barnes* v. *Addy* (1): *Attorney-General* v. *Earl of Chesterfield* (2): *Maw* v. *Pearson* (3). This is in fact an *à fortiori* case, for fraud on the part of *Plant* is altogether out of the question; beyond the desire to get the money for his clients, he had no interest in it whatever. Supposing he had been guilty of any wrong-doing at all, he would be responsible only to his clients, the Misses *Sager*.

Moreover, *Plant* is not a necessary party to this action at all, for the Court has before it the Misses *Sager*, who have actually received the money. If *Plant* is a necessary and proper party, the bankers who received the money in the first instance are equally so. The authorities clearly establish that unless an agent has derived a personal benefit from the transaction in question, or has been guilty of personal misconduct, he ought not to be joined as a defendant with his principal.

Swinfen Eady, for the Appellants the Misses *Sager*:—

Even if *Stephen Midgley* or *Plant* is ordered to repay the £135, the Misses *Sager* ought not to be ordered to repay a debt which, as we say, is owing to them, and as to which there has been no inquiry. The order dismissing the administration summons of the Misses *Sager* did not extinguish the debt; it merely decided that it was statute-barred—in other words, that it could not be recovered by action. The *Statutes of Limitation* (21 Jac. 1, c. 16, s. 3, and 3 & 4 Will. 4, c. 27, s. 42), do not extinguish the debt after the six years: all they provide is that payment shall not then be enforced by "distress, action, or suit." As the debt itself is not extinguished, an executor may, if it is justly due, pay it, if he pleases, after the six years. The distinction between obtaining payment by action and by means other

(1) Law Rep. 9 Ch. 244. (2) 18 Beav. 596.
(3) 28 Beav. 196.

than an action is pointed out by Mr. Justice *Kay* in *In re Marshfield* (1). Accordingly, the right of a creditor to receive payment of his debt is unlimited, though his right to enforce payment is limited. Here, the Misses *Sager* have received payment of their debt without an action. What equity is there to compel them to repay a sum of money received by them, not as volunteers, but in satisfaction of an obligation?

[LINDLEY, L.J.:—Lord *Eldon* says, in *Ex parte Dewdney* (2), "In the administration of assets under a creditor's bill executors are not bound to plead the *Statute of Limitations*; and, if they do not, the creditor, filing the bill, will have a decree on behalf of himself and all other creditors; and will be paid: but the constant course in the Master's Office is to take the objection against other creditors; and to exclude from the distribution those, who, if legal objections are brought forward, cannot make their claims effectual." After that, can you say that the other executor can pay out of the estate?]

There has been no adjudication that the debt is not payable, nor any inquiry as to whether there is in fact a debt or not. The matter came before the Court upon the plea of the statute by the one executor only, so that the sole question of law the Court had before it was whether that plea was good or not; as regards the other executor, who had not pleaded, there was no question to be tried. The order merely went to the decision of the point before the Court—whether the statute could properly be pleaded.

Neville, Q.C., and *Maidlow*, for *S. Midgley*.

Channell, Q.C., and *Upjohn*, for the Respondent, the Plaintiff MRS. *Midgley*:—

First, we say that, having regard to the dismissal of the summons, the payment of the £135 by *Stephen Midgley* was a breach of trust for which he is liable. Secondly, the Misses *Sager* got the benefit of that wrongful payment, and they are responsible for the acts of their agent, *Plant*, who had notice of all the circumstances. Thirdly, *Plant*, being a party to or cognizant of

(1) 34 Ch. D. 721. (2) 15 Ves. 479, 498.

C. A.
1893
MIDGLEY
v.
MIDGLEY.

the breach of trust, is liable. Possibly he may have a right to be indemnified by his principals; but it is no answer to the Plaintiff to say, "You must go against our principals."

As regards the neglect of *Stephen Midgley*, the Plaintiff's co-executor, to plead the statute, the Plaintiff, as residuary legatee, was entitled to insist upon his doing so, and therefore the parties must be treated as standing in the same position as if the statute had been pleaded by both executors: *In re Wenham* (1). By allowing payment of the debt, he committed a fraud on his power as an executor: an executor may be guilty of fraud on his legal powers in the same way as an ordinary donee of a power. Where there are two executors defendants to an action for the recovery of a debt, and one says he admits the debt, while the other pleads the statute, the Court will accept the plea that is most for the benefit of the estate: *Williams* on Executors (2); *Chaffe* v. *Kelland* (3). In the present case the Judge had, on the administration summons, to consider which defence or plea was most for the benefit of the estate; and he had to come to the conclusion that the plea of the statute was best for the estate, and that therefore that plea must be received. After such an adjudication it is impossible to hold that it is competent for a recalcitrant executor to set aside the statute and pay the debt. The effect of the judgment was to establish a *res judicata*, which each executor was afterwards bound to plead; and, further, it extinguished the debt altogether. It is as if a defendant in an action for debt pleads never indebted, also accord and satisfaction, and that the debt is statute-barred; supposing the Judge decides the debt is statute-barred, it becomes unnecessary for him to go on to decide the other questions. At all events, here there is a final determination between the parties that the debt is not to be recovered by action.

[LOPES, L.J.:—Even assuming the debt is barred, the question remains whether one executor may still pay. As to the executor who has raised the plea of the statute, the Court having decided that the debt is statute-barred, he would clearly be wrong in paying it.]

(1) [1892] 3 Ch. 59. (2) 8th Ed. vol. ii. p. 1953.
(3) 1 Roll. Abr. 929.

The decision on the administration summons constituted a *res judicata* binding on both executors, upon the doctrine that a judgment in favour of one of two joint contractors on a defence —such as the *Statute of Limitations*—which is open to both, is a bar to an action against the other joint contractor: *Phillips* v. *Ward* (1).

[A. L. SMITH, L.J :—That case was decided on the authority of *King* v. *Hoare* (2), where it was held that you can have only one judgment against joint contractors, so that a judgment recovered against one of two joint debtors is a bar to an action against the other.]

The judgment in favour of the one executor or joint contractor might be pleaded in abatement by the other. We rely also upon *Newington* v. *Levy* (3); *Greathead* v. *Bromley* (4); *Thomas* v. *Griffith* (5); *Baldwin* v. *Church* (6). The duty of an executor is to pay just debts and satisfy just claims against his testator's estate; "but it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands that are equally untenable in law and in equity . . . . If you have a contract which is not capable of being enforced either at law or in equity, I fail to see that a contract of that sort creates a debt or liability against the estate of a testator": *per* Lord Justice *Bowen* in *In re Rownson* (7). If the payment in question is allowed, this executor may defeat, not only the residuary legatee, but also every creditor of the testator, notwithstanding his desire that all his just debts should be paid. There is no decision that one executor can pay a statute-barred debt against the dissent of his co-executor. *In re Rownson* shews that what is there termed the "anomaly" of a single executor being at liberty to pay a statute-barred debt should not be extended.

As to the case against the Misses *Sager*, we are entitled to succeed against them on the equity that they have concurred in a breach of trust by their agents and have got the benefit of it.

(1) 2 H. & C. 717; 33 L. J. (Ex.) 7.
(2) 13 M & W. 494.
(3) Law Rep. 6 C. P. 180.
(4) 7 T. R. 455.
(5) 2 D. F. & J. 555.
(6) Cited 1 Str. 20.
(7) 29 Ch. D. 358, 363.

C. A.
1893
MIDGLEY
v
MIDGLEY.

With regard to *Plant*, though he was solicitor or agent to the Misses *Sager*, he is liable as constructive trustee, since he must be taken to have had knowledge of the impropriety of the payment of this sum, which is in fact trust money, it never having lost its quality of assets of the testator. *Barnes* v. *Addy* (1), *Hardy* v. *Caley* (2), *Attorney-General* v. *Earl of Chesterfield* (3), and *Maw* v. *Pearson* (4), have no application to a case where, as here, both principal and agent are tortfeasors—where the principal is employing his agent to do what is wrong. That distinction is pointed out in *Hardy* v. *Caley*.

[They also referred to *Petty* v. *Cooke* (5).]

Maidlow, in reply, for *S. Midgley*, referred to *In re Radcliffe* (6).

Hopkinson, in reply, for *Plant*, cited *Stahlschmidt* v. *Lett* (7); *Godard* v. *Gray* (8); *General Steam Navigation Company* v. *Guillou* (9); *Coombs* v. *Coombs* (10).

Swinfen Eady, in reply, for the Misses *Sager*.

LINDLEY, L.J.:—

In this case there are three appeals against a judgment of Mr. Justice *Romer*. One is an appeal by *Stephen Midgley*, there is another appeal by the Misses *Sager*, and there is a third appeal by Mr. *C. H. Plant*. Why they could not have been consolidated and dealt with in a less expensive way I do not know.

The short point which arises is as follows: The Plaintiff Mrs. *Isabella Midgley* and the Appellant *Stephen Midgley* were co-executors of Mrs. *Midgley's* husband. It appears that the Misses *Sager* claimed to be creditors against the testator's estate, and that the executors took different views of what ought to be done about paying the Misses *Sager*—*Stephen Midgley* being of opinion that they ought to be paid, and Mrs. *Midgley* being of opinion

(1) Law Rep. 9 Ch. 244.
(2) 33 Beav. 365.
(3) 18 Beav. 596.
(4) 28 Beav. 196.
(5) Law Rep. 6 Q. B. 790.
(6) 7 Ch. D. 733.
(7) 1 Sm. & Giff. 415.
(8) Law Rep. 6 Q. B. 139.
(9) 11 M. & W. 877.
(10) Law Rep. 1 P. & M. 288.

that they ought not to be paid. She was not satisfied that her husband owed the money; besides which she contended that their debt, assuming it to have been a just one, was barred by the *Statute of Limitations.*

I will assume without deciding it that it was perfectly competent for Mr. *Stephen Midgley*, in that state of things, to have paid the Misses *Sager*. I will assume, too, notwithstanding that he knew of the dispute about the debt *bonâ fide* raised by his co-executrix and her objection to pay it, he nevertheless could have paid it. I am disposed to think that is the law, although I do not think there is any case which goes quite to that length. Certainly in 1826 no less a Judge than the late Baron *Bayley* said it was not the law. In a case of *M'Culloch* v. *Dawes* (1), Mr. Justice *Bayley* said this (speaking of executors): "They are bound, if possible, to resist such a claim;"—that is, a claim barred by the statute—"they have no right to waive any legal defence to such an action: and if they did, and were to pay a debt, against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property." I do not say that is the state of the law now. I do not think it is, because that passage was called pointedly to the attention of Vice-Chancellor *Wood* in *Hill* v. *Walker* (2) in 1858, and he dissented from it. The Vice-Chancellor said: "It certainly cannot be considered to be law at the present day, that executors, paying a debt against the recovery of which the *Statute of Limitations* might be pleaded as a legal bar, render themselves liable over to those who are interested in the testator's property. Instances of such payments must very frequently have occurred, and yet I am not aware of any case in which an executor, paying such a debt, has been held to incur any liability." Speaking now with a very considerable and long experience in these matters, I have no doubt whatever that the view stated by Vice-Chancellor *Wood* in 1858 has been accepted as good law ever since, and that the statement in the passage I read from the judgment of Mr. Justice *Bayley* has not been followed for the last thirty years at least. But how far the Courts have gone is another matter. As

(1) 9 D. & R. 40, 43. (2) 4 K. & J. 166, 169.

C. A.
1893
MIDGLEY
v
MIDGLEY
Lindley, L.J

a general proposition it is settled that an executor can pay a statute-barred debt and not be guilty of *devastavit*.

The position of affairs being what I have mentioned, Mr. *Stephen Midgley* did not think fit to claim the benefit of the statute. His co-executor did, and the consequence was that the Misses *Sager* brought an action, not at Common Law but, which clearly was the same thing and would have the same effect, in the Chancery Division for administration of the estate—that is to say, an action for payment of their debt in due course of administration. That was the scope and object of their summons. Their summons came on before the Registrar in the Palatine Court of *Lancaster*, and it was met in this way. *Stephen Midgley* admitted the debt, and said he thought it ought to be paid. His co-executor, the widow, denied the debt, disputed it, and pleaded the statute. What was to be done? Was the learned Judge before whom the case came to take the admission of the executor who admitted the debt and give the Plaintiff a decree for administration, or was he to attend to the plea of the widow that the statute barred the Plaintiff's debt? Upon that point he did that which is in accordance with the law, which is correctly laid down in *Williams* on Executors (1): "If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non assumpsit*, their plea shall be received." Acting upon that principle, the learned Judge did this. He had before him the two views, and he felt himself bound by law to attend to the plea of the statute. The question whether the debt was barred by the statute was accordingly gone into, and it was decided that the debt was barred—that is to say, there was by him at that time and under that state of circumstances an adjudication that this particular debt which was being sued for was not recoverable out of the estate. I do not say he decided it was not due, but there was an adjudication that it was not recoverable. If it had been recoverable as a matter of course, or in his discretion in the

(1) 8th Ed. vol. ii. p. 1953.

matter, he would have granted the usual decree for administration of the estate. That is the position of affairs.

Now, after that Mr. *Stephen Midgley*, under the advice of his solicitor—and it really was by the contrivance of Mr. *Plant*—notwithstanding that adjudication, paid that debt out of the assets, and now seeks to justify that payment. Is it in accordance with principle that that can be right? It seems to me upon principle that it is clearly and manifestly wrong. What is the principle? The general principle is, that it is the executor's duty to protect the estate against demands which by law cannot be enforced against it. That is his duty. That general principle is a wholesome principle, not to be cut away or narrowed, and it was discussed and recognised and enforced in a recent cause in this Court of *In re Rownson* (1), where the point was whether the executor could pay a debt to which the *Statute of Frauds* was pleaded. The Court said, No. On general principle I take it to be clear that it was distinctly wrong for the executor to pay a debt which had been judicially decided not to be recoverable out of the estate which it is his duty to protect.

But then it is said there is an exception as regards the *Statute of Limitations*. There is an exception. The question is, What is the extent of the exception? The exception itself I say no more about. I have read the statement as to that from the decision of Vice-Chancellor *Wood* in *Hill* v. *Walker* (2), and I do not wish to diminish it to any extent. How far has it gone? Has it ever been decided that an executor can justify the payment out of assets of a debt which has been judicially held to be irrecoverable? There is no such case. No such authority can be found; and we are asked to extend this anomalous principle and not to apply a sounder and more general principle. What is the right course to pursue? Are we to extend this anomalous principle, or are we to maintain a wholesome and general principle? My answer is, that an anomalous principle is not to be extended, but is to be confined within the limits of its own anomaly. That rule was distinctly enunciated and acted upon in the case to which I have referred, and unless there is authority which drives me to say that an executor can pay a debt which has been

(1) 29 Ch. D. 358. (2) 4 K. & J. 166, 169.

C. A.
1893
MIDGLEY
v.
MIDGLEY
Lindley, L. J.

judicially determined not to be recoverable, I will not be the first to say he can. It seems to me it would be wrong. Technically, I take it, it is manifestly wrong. Technically, the executor, in the circumstances to which I have alluded, is in a position to plead to a fresh action, not only the statute, but *res judicata*. On what principle is he to throw over the protection he has got by the judgment of the Court? He falls immediately within the general principle to which I have alluded, and he is outside the anomalous principle to which I have also alluded. That was the short ground on which Mr. Justice *Romer* decided this case. He said, in effect: "I agree that an executor can pay a statute-barred debt; but an executor has no business to throw over the protection which the decision of the Court has given him." I entirely agree with Mr. Justice *Romer*, and I repeat the conclusion I have arrived at, that when there has been a judicial decision that the debt is not recoverable the right of the executor to pay that debt is gone. It is a new point, but I have no doubt about it; and I therefore hold that *Stephen Midgley* when he did pay that debt did that which in point of law he had no right to do. It follows that *Stephen Midgley's* appeal must be dismissed.

Then, as regards the case made against the Misses *Sager* and Mr. *Plant*, the matter is different. As to them the circumstances are peculiar. At the time the writ in this action was issued, the money which had been improperly got out of a fund out of which it ought not to have been taken was under the control of *Plant*, and standing to the credit of the two Misses *Sager*. How was that money to be got back except by some proceeding to which both were parties? It was necessary they should both be parties, and as the Misses *Sager* had the money it was right to compel them to restore it. They got it from a fund out of which it ought never to have been paid, and with knowledge of the circumstances. Therefore, I am of opinion the appeal of the Misses *Sager* fails also.

Now, as to *Plant*. If this was like the case of *Barnes* v. *Addy* (1) and *In re Spencer* (2), I should think the action ought to be dismissed against *Plant* and dismissed with costs. There

(1) Law Rep. 9 Ch. 244. (2) 51 L. J. (Ch.) 271.

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used to be a notion—a hazy notion—in Chancery that you could file a bill against a solicitor to get costs out of him even if you could not get relief against him. I never understood it, nor did anybody else that I ever heard of. But this supposed doctrine was finally set at rest by Lord *Selborne* in the case of *Barnes* v. *Addy* (1). The question whether *Plant* ought to be saddled with costs, depends, in my judgment, on whether there are circumstances which justify the Court in giving relief against him. It appears to me there are circumstances which amply justify such relief. In the first place, the money was in his control at the time when the writ in this action was issued. In the next place, that money was got by him by a deliberate scheme to get it paid out of the fund out of which I have already held it was not legally recoverable. He was the *fons et origo* of the whole of this mischief. I do not allude to matters which it is unnecessary to allude to, but we know the facts. We know how the money was got. We know it was his doing; and he, having been the instigator and schemer of the whole thing, in my opinion, Mr. Justice *Romer* was justified in making a decree against him. His appeal, also, ought to be dismissed with costs.

LOPES, L.J.:—

Unless this had been a somewhat novel and interesting point, I should have reposed under the very elaborate and excellent judgment which has been delivered by my learned Brother; but as it is somewhat a novel and important point, I will shortly state what I think about it. I think the law is clear to this extent, that an executor is not bound to set up the *Statute of Limitations* to a claim, and that, though the debt may be barred, he may nevertheless pay it. But that is before decree in an administration suit; after decree in an administration suit, I think it is competent for any person interested in the fund to take advantage of the *Statute of Limitations*, notwithstanding the refusal of the executor to set it up. So far the law is perfectly clear. Whether before decree an executor can pay a statute-barred debt against the protest of persons interested in the assets of the testator, and against the wishes of his

(1) Law Rep. 9 Ch. 244.

C. A.
1893
MIDGLEY
v
MIDGLEY
Lopes, L J

co-executor, as far as I know (and I believe I am correct) has never yet been decided, and I do not propose in this case to express any opinion on the subject. It is unnecessary to decide such a point, and it is a matter which no doubt will arise, and will have to be decided in the future.

Now I will deal with this case. An originating summons was taken out by some creditors, the Misses *Sager*, against the two executors under this testator's will, viz., *Stephen Midgley* and *Isabella Midgley; Isabella Midgley* being the Plaintiff in the present action. This originating summons being taken out, it appears that *Stephen Midgley* was willing—nay, anxious—to pay the alleged debt, though it was statute-barred. *Isabella Midgley*, on the other hand—who, it may be observed, was the residuary legatee—was not anxious that the debt should be paid, and for reasons which are obvious; and she set up the *Statute of Limitations*. The Court having these two executors before it, and these two different courses being taken by the executors, had to determine the matter, and the Court determined it in this way. It upheld the plea of the statute as set up by *Isabella Midgley*, holding that the claim of the Misses *Sager* was not an enforceable debt. In point of fact, the Court adopted the view of the law stated by *Williams* on Executors, and referred to in the case of *Chaffe* v. *Kelland* (1), that in a matter such as this, that view was to be taken which was most to the advantage of the testator's estate. Accordingly, the Court upheld the plea set up by *Isabella Midgley*, and solemnly decided that this debt was not an enforceable debt. *Stephen Midgley*, it will be recollected, was a Defendant and a party to this originating summons, and knew well all that transpired. Mr. *Plant* also knew all that transpired on the dismissal of this originating summons, because he was the solicitor who was acting for the Misses *Sager*. Therefore, we have both the Misses *Sager* and *Plant* knowing what course the originating summons had taken, and what had been decided by the Court in that case.

Now, what happens afterwards? *Stephen Midgley*, notwithstanding what had taken place, notwithstanding this solemn decision of the Court to the effect that this debt was not an

(1) 1 Roll. Abr. 929.

enforceable debt, pays the debt out of the assets of the testator—I need hardly say, without consulting *Isabella Midgley*, and of his own motion.

That being so, the question which arises in this case is this, and it is the first and governing question: Was *Stephen Midgley* justified in doing as he did? I am clearly of opinion he was not. Whatever the position of a disputed debt may be before it has been adjudicated upon and determined to be a debt not enforceable, I have no hesitation in holding that a co-executor, knowing what has taken place in proceedings such as this originating summons, who after an adjudication upon it pays the debt, commits a *devastavit*, and is liable to refund the money. It appears to me that to hold otherwise would be an unjustifiable disregard of the decision of the Court that had adjudicated upon the debt. To hold otherwise would be against the principle which is admitted to be a good and sound principle, viz., that it is the duty of an executor to protect his testator's assets, and it would be even worse—it would be an extending of this doctrine with regard to the payment of statute-barred debts which is admitted to be anomalous, and about which it has over and over again been said that it is a doctrine which ought not to be extended. If the Misses *Sager* had brought an action for this debt they would have been conclusively answered by the plea of *res judicata*. Can it be said, notwithstanding the fact, that a plea of *res judicata* would be a conclusive answer, that the other executor may of his own motion pay this debt which the Court has said is not to be recoverable? Speaking for myself, I decline to adopt such a view. After an adjudication that the debt is irrecoverable I am clearly of opinion that no executor would be justified in making payment of it. So much for *Stephen Midgley*.

With regard to the other Defendants, the Misses *Sager* and *Plant*, I have little to say. It seems to me clear that the Misses *Sager* must be held liable. They have obtained the benefit of this payment by *Stephen Midgley*, and they still hold the money. It may be said that they knew very little with regard to what *Plant* was doing. I think that very likely. At the same time *Plant* was their solicitor, and although he says he acted on his

C. A.
1893
MIDGLEY
v.
MIDGLEY
Lopes, L J

own responsibility, and, I believe he did, yet, as he was their solicitor, they must be taken to have known what he was doing. The money was obtained for them, they got the benefit of it, and it is still under their control.

With regard to *Plant*, I have no hesitation in saying that he is liable. He seems to me to have been the instigator of this matter from beginning to end. Nobody admires more than I do seeing a solicitor active for his client; but I think Mr. *Plant* passed the bounds of legitimate zeal which are becoming and proper in a solicitor who has his client's interests at heart. He seems to me to have been a great deal more active in the matter than he was called on to be. I am of opinion that the learned Judge below was right, and that Mr. *Plant* ought to be held liable to pay the costs in this case.

A. L. SMITH, L.J.:—

This point, which involves a very small amount of money, viz., £135, has been argued at great length and at enormous cost, wholly disproportionate to the money at stake. This has arisen in part by reason that the Misses *Sager* have been represented by eminent counsel, the solicitor, Mr. *Plant*, has been also represented by eminent counsel, and *Stephen Midgley* has been likewise so represented, and for two whole days points have been discussed, of importance, no doubt, but many of which it is not necessary to determine, so as to adjudicate safely on the point in issue.

The sole point is whether or not *Stephen Midgley*, who is a co-executor with the widow of *John Midgley*, the testator, was entitled, on the 26th of May, 1892, to pay over the sum of £135, which he got out of the assets of the testator, to these ladies in *Yorkshire*. I will go at once to the material parts of the case. The law applicable to what is or is not a *devastavit* is clear, and nobody has disputed it. If an executor pay what he ought not to pay he is guilty of a *devastavit* except in one particular case, and that is this, that if he has the plea of the *Statute of Limitations* which he could plead as an available plea he need not do so. But with this exception, if the executor pays what he ought not to pay he is guilty of a *devastavit*.

What happened here? Before we come to the 9th of April, 1892, the date of this originating summons, there had been some litigation, in the whole of which Mr. *Plant* took part. But I pass that over, because it is not material to the issue we have to decide. On the 9th of April, 1892, Mr. *Plant*, for the Misses *Sager*, took out an originating summons for the purpose of administering the estate of the testator, Mr. *John Midgley*, and of obtaining for Misses *Sager* this sum of £135. Whether this was a debt justly due at that time or not I do not inquire. As to that, statements have been made at the Bar on the one side and the other. Mr. *Channell* says it was not, that there had been accord and satisfaction, and so on. The other side say, "No, there was no accord and satisfaction, and it was justly due." What we have to decide is not whether it was a good debt or a bad one, or could be proved to have been paid at this time. When this originating summons was taken out one of the executors, the widow, pleaded the *Statute of Limitations*, and said, "Your debt of £135 accrued six years before the summons was taken out." *Stephen Midgley*, apparently through the instrumentality of Mr. *Plant*, did all he could to defeat that plea which the widow set up; and he swore an affidavit in which he said the debt was justly due, and that he wanted to pay it out of the assets of his testator. I do not pause to state why he wanted to do that. Reasons can be given. The Judge of the Palatine Court who heard this case came to a conclusion that the debt was a debt which could not be recovered in a Court of Law, and that the statute was a bar to the whole of the proceedings, and therefore gave judgment for the Defendant the executrix, at any rate, if not for both Defendants, on that summons. Mr. *Plant* knew this, the Misses *Sager* knew this—that is, if Mr. *Plant* ever told them—and *Stephen Midgley*, I suppose, knew this, for he had sworn an affidavit in the matter.

What did these do? Having been defeated on this originating summons, they then found out that there were some moneys standing to the credit of the dead man's estate, which were the proceeds of a policy, and Mr. *Plant* together with *Stephen Midgley*, who had been defeated and told by a Court of competent jurisdiction that this debt could not be recovered in any Court, set

C. A
1893
MIDGLEY
v
MIDGLEY
A. L. Smith, L. J.

to work and got this money—£135—and transferred it into the account of Mr. *Plant* to the credit of his clients, the Misses *Sager*. Ought this to have been done?

It is said that at the time this was done *Stephen Midgley* was an executor who had only the defence of the *Statute of Limitations*, and that inasmuch as he was not bound to set up the statute he was entitled to make this payment out of the assets of his testator. Here comes the real point of the case. Was *Stephen Midgley* at this time in the position of an executor who only had the *Statute of Limitations* to rely on? It seems to me clearly he was not; he was in a far better position than an executor who only had the statute to plead. He had, first of all, an adjudication by a Judge of a Court of competent jurisdiction, that the debt had accrued more than six years before summons. He had an adjudication of a Court that there had been no acknowledgment by way of payment or otherwise to take the debt out of the statute; and he had an adjudication of the Court that the Defendants had not been beyond the seas; or, in other words, he had an adjudication that the statute was an absolute bar to any action that the Misses *Sager* could bring. I think it manifest that this could be pleaded as *res judicata*, and if authority for that is necessary I refer to the case of *Newington* v. *Levy* (1) and the judgments of Baron *Martin*, Baron *Bramwell*, and Justice *Blackburn* therein, all of whom say that not only what you do set up in an action, but what you could have set up in an action before judgment, is concluded by the judgment, and cannot be reopened afterwards in litigation between the same parties. So I say here, this executor, *Stephen Midgley*, had beyond all doubt more than the plea of the *Statute of Limitations*; he had an adjudication which he could set up against any claim which was made by these two ladies, the Misses *Sager*, for this £135.

That being so, it seems to me this Court has concluded the matter in the case of *In re Rownson* (2), where Lord Justice *Fry* said that this exception of the *Statute of Limitations*, which an executor need not set up, was an anomaly. In that case the question was whether he was bound to set up the *Statute*

(1) Law Rep. 6 C. P. 180. (2) 29 Ch. D. 358.

of Frauds, and they said that he was. If a man had at his command a plea which would be a plea in bar, as I hold *Stephen Midgley* had, I cannot distinguish this case from that of *In re Rownson* (1). I fully agree with the judgments which fell from the Lords Justices in that case, viz., that this anomaly is not to be extended. This is firm ground. My Brother *Romer* so decided it, and I agree with him.

That brings me to the point whether *Stephen Midgley* was guilty of a *devastavit* when he paid the money under the circumstances which I have narrated. My answer is, Yes.

Then comes the question about these ladies and Mr. *Plant*. On that I have nothing to add to what has fallen from the Lords Justices who have preceded me. It appears that Mr. *Plant* was the originator of all this; that he had the money under his control, although it was held for the benefit of the Misses *Sager*, and that, therefore, they were necessary parties.

Solicitors: *Crowders & Vizard*, agents for *Stanton & Sons, Chorley; Robbins, Billing & Co.; Bower, Cotton, & Bower*, agents for *Plant, Abbott, & Plants, Preston; J. E. & H. Scott.*

M. W.

WEBB *v.* SHROPSHIRE RAILWAYS COMPANY.

[1891 W. 3955.]

Railway Company—Issue of Stock at a Discount—Issue of Debentures at a Discount—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16) —*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 21—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 27—*Companies Clauses Act*, 1869 (32 & 33 *Vict. c.* 48), *s.* 5.

A company governed by the *Companies Clauses Consolidation Act*, 1845, and the Acts amending it, may issue fully paid-up original stock at a discount, and for payment either in cash, or for land or labour or other consideration, subject to the liability of the directors for issuing the stock below its value without necessity.

Whether such a company can issue shares liable to calls at a discount, *quære.*

Such companies may also issue debentures or debenture stock at a

(1) 29 Ch. D. 358.

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY.

discount, if authorized to borrow money or raise money by mortgages or debentures.

The principle of *Campbell's Case* (1) is applicable to such companies, as well as to companies constituted under the *Companies Acts*, 1862 and 1867.

An agreement by a railway company with bankers to issue to them paid-up stock and debentures at a discount, in consideration of a large advance of money by them, *held* under the circumstances valid and reasonable.

The decision of *Romer*, J., affirmed.

THE object of this action was to obtain a declaration that certain agreements entered into between the *Shropshire Railways Company* and *Whadcoat Brothers & Co., Limited*, bankers, were void, as being beyond the powers of the railway company, and for ancillary relief. The facts were as follows:—

A company called the *Potteries, Shrewsbury, and North Wales Railway Company*, or more shortly the *Potteries Company*, was formed in 1866 by a special Act (29 & 30 Vict. c. cci.) out of two previously existing companies, which were then dissolved. Their undertakings were united into one, which became the undertaking of the new company. The undertaking consisted of certain railways and works authorized by various Acts of Parliament, and situate in the neighbourhood of *Shrewsbury*. The company thus formed was not prosperous, and in 1868 a scheme of arrangement between the company and its creditors was entered into. In 1874 an extension of the company's railway was authorized. A receiver was in receipt of the tolls of the undertaking, but no interest was ever paid on the company's debenture stocks. The railway could only be kept going by neglecting the necessary repairs, and in June, 1880, it was closed to public traffic. In 1881 an Act (44 & 45 Vict. c. clviii.) was passed for winding up the company. This Act, after reciting the history of the company and the state in which it then was, further recited as follows:—

"And whereas for some years the said receiver has been enabled to keep up a small, but inefficient, service of trains, only by devoting the whole of the said tolls and receipts of the company's undertaking to the mere running expenses, and by

(1) 4 Ch. D. 470.

neglecting the maintenance and repair of the permanent way and bridges, but having no funds to execute certain repairs deemed necessary by the Board of Trade for the safety of the public, the railway was, by order of the directors, closed to public traffic on the 22nd of June, 1880, and has since remained so: And whereas the closing of the railway is the cause of great loss and inconvenience, not only to the neighbourhood immediately affected, but to the public generally; but the railway cannot be reopened for public traffic unless the company be freed from the weight of existing debts, liabilities, and incumbrances: And whereas the shareholders of the company have no interest whatever in facilitating the reopening of the railway, as, under no conceivable circumstances can receipts of the railway produce any dividend on their capital outlay: And whereas it is expedient that the undertaking of the company be sold, and that their assets be distributed among the persons legally entitled thereto, and that the affairs of the company be wound up by the Chancery Division of the High Court of Justice, and that the company be dissolved."

The Act then provided for winding up the *Potteries Company* (sect. 3), and authorized the liquidator to sell the undertaking to any railway company (sect. 4); and, upon payment of the purchase-money and execution of a proper conveyance, the undertaking of the company was to be vested in the purchaser, subject to the obligations of the company with respect to the maintenance and use of the railway, but discharged from all the other obligations of the company, except those incurred for land (sect. 6). The purchase-money to be paid to the liquidator was to be applied by him in the manner prescribed by sect. 8, which was shortly this—viz., (1.) and (2.) in payment of costs and expenses for completing purchases of land; (3.), (4.), (5.), and (6.) in paying, according to a scale, the debenture-holders and other creditors of the company; and, lastly, (7.) and (8.), in paying something to the shareholders.

In April, 1882, the company was ordered to be wound up, and in March, 1888, an agreement for the sale of the undertaking to the promoters of the *Shropshire Railways Company* was entered into. In the same year the *Shropshire Railways Act*, 1888

C. A
1893
WEBB
v
SHROPSHIRE
RAILWAYS
COMPANY

(51 & 52 Vict. c. cxcii.), was passed, which, after referring to the closing of the *Potteries Company's* railways and branches in 1880 and to the Act of 1881 and the proceedings under it, recited as follows:—

"And whereas the liquidator has been unable to effect a sale of the undertaking of the *Potteries Company* for a sum of money, as contemplated by the Act of 1881, and the *Potteries Railway* has remained, and now is, closed for public traffic: And whereas an agreement (in this Act referred to as 'the scheduled agreement') between the liquidator of the one part, and certain persons therein named promoters of the Bill for this Act of the other part, a copy of which agreement is set forth in the schedule to this Act, has been entered into for the sale to the company by this Act incorporated of the undertaking of the *Potteries Company*, upon the terms and subject to the conditions in the said agreement expressed, and it is expedient that the said agreement be confirmed, and provision made for carrying into effect the said terms and conditions: And whereas the persons in this Act named, with others, are willing to acquire the undertaking of the *Potteries Company* upon and subject to the terms and conditions of the scheduled agreement, and to reopen the *Potteries Railway* for public traffic, if incorporated with the necessary powers for that purpose: And whereas it is expedient that the company to be incorporated (in this Act called 'the company') be empowered to construct the additional railways by this Act authorized, in extension of, or in connexion with, the *Potteries Railway*, and to abandon part of the *Potteries Railway*, which will be rendered unnecessary by the construction of certain of the railways by this Act authorized, and to acquire certain lands in this Act particularly mentioned."

The Act then, by sect. 4, incorporated a new company, and by sect. 5 made the scheduled agreement binding on it. That section was as follows:—

"The scheduled agreement is hereby confirmed and made binding according to the terms and conditions thereof upon the liquidator and the company respectively, and the liquidator shall transfer to the company the undertaking of the *Potteries*

Company, and the transfer shall be carried out in accordance with the provisions of sects. 5, 6, and 7 of the Act of 1881 with the exception of so much of sect. 7 as relates to the right to levy tolls for the use of the undertaking. The liquidator shall have power to accept as purchase-money, or part purchase-money, fully paid-up stock in the *Shrewsbury* separate undertaking of the company by this Act constituted, and such stock shall be deemed to be purchase-money within sect. 8 of the Act of 1881, and shall be issued to the liquidator, or as he may direct, to be applied in accordance with sub-sects. 1 and 2 (so far as persons entitled to claim under those sub-sections agree to accept such stock in satisfaction and discharge of their claims), and sub-sects. 3, 4, 5, 6, and 7 of the said section."

For financial purposes the new company was divided into two undertakings—the *Shrewsbury* separate undertaking, and the *Market Drayton* separate undertaking (sect. 14). The capital of the *Shrewsbury* separate undertaking was not to exceed £350,000, consisting of fully paid-up stock, and such nominal amount, not exceeding the above sum, as might be necessary or convenient for the company to create and issue for the purposes and in accordance with the scheduled agreement (sect. 15). In addition, however, to this paid-up stock, the company was empowered, by sect. 27, to borrow on mortgage of the *Shrewsbury* separate undertaking any sum not exceeding £100,000 when and so soon as the *Potteries Railway* should be transferred to and vested in the new company under the provisions of that Act and of the Act of 1881. By sect. 30 debenture stock might be issued instead of mortgages.

Sect. 31 was as follows:—

"All moneys raised under this Act, whether by shares in or by debenture stock or mortgages of either separate undertaking of the company, shall be applied only for the purposes of that undertaking, being in all cases purposes to which capital is properly applicable (that is to say), (A) Money raised by debenture stock or mortgages charged upon the *Shrewsbury* separate undertaking shall be applied only in payment of the purchase-money or consideration for, and the expenses of, the purchase of

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY.

the *Potteries Railway*, and in putting so much of that railway as shall not be abandoned under this Act into efficient and complete working order, fit for passenger and goods traffic, and in purchasing lands for the purposes of that separate undertaking, and constructing the railways and portion of railway by this Act declared to be part of that separate undertaking, and in providing rolling and working stock and plant for that separate undertaking, and in payment of the costs, charges, and expenses of applying for, obtaining, and passing this Act . . . and otherwise for purposes of the *Shrewsbury* separate undertaking."

The principal clauses of the scheduled agreement were as follows:—

"(3.) The liquidator shall sell, and the new company shall purchase, the undertaking of the *Potteries Company* on the terms and subject to the conditions hereinafter expressed. (4.) The purchase-money to be paid by the new company to the liquidator shall be such a sum in money, or such an amount of fully paid-up stock in the *Shrewsbury* separate undertaking of the new company, as will satisfy all claims under sub-sects. 1 and 2 of sect. 8 of the said Act of 1881, and, in addition thereto, such an amount of fully paid-up stock in the *Shrewsbury* separate undertaking of the new company as will enable the liquidator to pay in such stock, at the par value thereof, the maximum percentages mentioned in sub-sects. 3, 4, 5, 6, and 7 of sect. 8 of the Act of 1881. (5.) The purchase is to be completed within six months of the passing of the Act, or such further time as the liquidator shall allow, and upon payment of the purchase-money the undertaking of the *Potteries Company* shall vest in the new company; but the new company shall not be bound to see to the application, or be liable for the misapplication or non-application, of any part of the purchase-money."

On the 3rd of June, 1890, an agreement was made between the company of the one part, and the Defendants, *Whadcoat Brothers & Co.* (thereinafter called the bankers), of the other part, the general purpose of which was to provide for advances to be made by the bankers to the company, and the terms of such advances. It recited that the company had derived benefit from the pro-

fessional advice and assistance of the bankers as financial and railway experts, and provided that the bankers should pay to the company £79,500—as to £59,500 in cash, and as to £20,000 in cash or in paid-up stock of the railway company at the option of the bankers. This advance was to be made at the periods therein mentioned, and was to be expended in paying the contractors who were constructing the railway. In return for this advance, and in consideration of the advice and services of the bankers, the company undertook to pay the bankers £173,000—as to £90,200 in first mortgage debentures of the railway company, as to £53,000 in fully paid-up stock, and as to £30,000 in second mortgage debentures, for leave to create which the company was to apply to Parliament. The company also undertook to assign to the bankers all their interest in £5000 first debentures, which were to be deposited with the liquidators of the *Potteries Company* in provision for unascertained claims; and further, the company undertook to appoint the bankers sole agents for the sale and disposal of any debentures, stock, or shares which they might be authorized by Parliament to issue within the next two years. It was further agreed that the price and times at which the whole or any portion of the debentures or ordinary stock or debenture stock should be offered by the company for subscription, tender, or sale should be fixed by and at the absolute discretion of the bankers.

The sum of £173,000 was to be paid to the bankers as they should elect, either by some of the £90,200 first debentures, or some of the £30,000 A debentures, if authorized by Parliament, or out of the £53,000 fully paid-up stock. Provided, that if the company should not by the 1st of September, 1891, have obtained power from Parliament to issue the £30,000 A debentures, the bankers should be entitled to demand a proportionate sum in cash.

By a second agreement of the 1st of August, 1890, £5000 in debentures and £5000 stock were to be paid to the bankers, in consideration of their paying £5000 earlier than they had agreed to do, and not against engineer's certificates, as previously agreed.

The bankers paid the contractors several sums in accordance

C. A.
1893
WEBB
v
SHROPSHIRE
RAILWAYS
COMPANY

with these agreements; and they elected to pay £20,000 in fully paid-up stock, and not in cash, and did so pay the same, receiving in return first debentures from the company.

By another agreement, dated the 10th of December, 1890, made between the company and the bankers, certain further provisions were made respecting the stock to be issued to the bankers; and it contained the following proviso—that if the company, having obtained power from Parliament to create and issue £30,000 A debentures, should fail to create and issue such debentures to the bankers within one month of the Royal assent being given to the bill, then the bankers should be entitled to receive by way of liquidated damages the sum of £50,000.

By the *Shropshire Railways Act*, 1891 (54 & 55 Vict. c. cxl.), it was enacted that the company might raise a sum not exceeding £75,000 by the issue of new shares or stock, and that the company might borrow in respect of the original stock of the company sums not exceeding £16,600 in addition to the £100,000 authorized by the Act of 1888, and in respect of the additional capital of £75,000 any sum not exceeding £25,000, and might create and issue further debenture stock as therein provided.

Pursuant to these agreements the company issued to the bankers first debentures to the amount of £90,200, and a large part of the £53,000 fully paid-up stock; and the company disposed of a considerable sum of debenture stock at par.

The Plaintiff *Webb* was the holder of fully paid-up ordinary stock of the company. He contended that the three agreements of the 3rd of June, the 1st of August, and the 10th of December, 1890, were not merely improvident, but beyond the powers of the company, and brought the present action against the company and the bankers, on behalf of himself and all other holders of capital stock in the company, claiming a declaration that the agreements were void, that the issue of all debentures, debenture stock, capital stock, and shares to the bankers or their nominees was *ultrà vires* and void, and injunctions ancillary to such declarations.

Two other actions, namely, *London Financial Association* v. *Whadcoat*, and *Whadcoat* v. *Shropshire Railways Company*, which involved the same questions, were heard at the same time.

The actions came on for hearing before Mr. Justice *Romer* on the 8th of December, 1892.

Sir *H. Davey*, Q.C., and *Dunham*, for the Plaintiff *Webb*.

Chadwyck Healey, Q.C., and *G. P. Macdonell*, for the railway company.

Haldane, Q.C., and *Whinney*, for the *London Financial Association*.

Sir *J. Rigby*, S.G., *Neville*, Q.C., and *Kirby*, for *Whadcoat Brothers & Co.*

1893. Jan. 14. ROMER, J.:—

The main object of these actions is for a declaration that the agreements entered into between the *Shropshire Railways Company* and *Whadcoat Brothers & Co., Limited*, are void as being *ultrà vires* the railway company, and for cancellation of the stock and debentures issued in pursuance thereof to, and now held by, the limited company or its officers, and for ancillary relief. Before I proceed to consider the grounds on which it is urged that the agreements were *ultrà vires*, I think it right to make the following remarks with regard to their fairness, regarded as a mercantile transaction. The Plaintiffs do not allege before me that the agreements were obtained by fraud, or were brought about by any dishonest conduct on the part of the limited company, or on the part of those who acted for the railway company in the matter. All that is said before me against the agreements is, that they were improvident on the part of the railway company. [His Lordship then considered the terms of the three agreements which were sought to be impeached, and said that, looking at all the circumstances, they were not unfair, unreasonable, or improvident. He then proceeded:—]

The agreements thus honestly entered into have been acted on. The limited company has paid to and for the benefit of the railway company large sums of cash, and has received in discharge thereof capital stock and debentures of the railway company, as provided for by the agreements. It is now sought

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY.
Monier, J

by these actions to deprive the limited company of such stock and debentures, and to leave the company, in respect of its cash payments, in the position of an unsecured creditor of the railway company, which, practically, would amount to the limited company losing the cash it has paid. This would indeed be an unfortunate result to flow from an honest transaction; but it may be that it cannot be avoided if the Plaintiffs are right in their contention as to the agreements being *ultrà vires* the railway company, and I therefore proceed to consider the grounds on which that contention is based. It is said, in the first place, by the Plaintiffs' counsel, that the railway company could not issue its capital stock of the *Shrewsbury* undertaking except on terms of the purchaser paying for it the full nominal amount of the stock, which admittedly, under the agreements, the limited company did not do; or, as it was sometimes expressed, that the railway company could not validly issue its capital stock at a discount. And the argument was put substantially in this way: The Act of 1888, which created this railway company, incorporated, as usual, the *Companies Clauses Consolidation Acts* and the *Railway Clauses Consolidation Acts*, or certain parts of them. It was then pointed out that if the incorporated Acts were looked at, it would be seen that though, by express provision, new shares in a company governed by those Acts might be issued at a discount, yet there was no corresponding provision with regard to the original shares of such a company. And it was then urged that, according to the true construction of the incorporated Acts, the view that original shares could be issued at a discount was by implication negatived; and, in support of this, especial reliance was placed on those sections of the *Companies Clauses Consolidation Act*, 1845, which provide for shares being of a fixed amount, and for calls being paid on the shares subscribed for, and it was said that those sections were similar to corresponding clauses in the limited liability *Companies Act* of 1862, on which the House of Lords, in *Ooregum Gold Mining Company of India* v. *Roper* (1), had based its decision, that shares in a limited liability company could not be issued at a discount. But I do not think that in the present case I am called upon

(1) [1892] A. C. 125.

to decide, or ought to decide, this highly important general point, which has never yet been the subject of judicial opinion, for in my view it does not arise for decision in this case. It may be that, where the special Act forming a railway company is silent on the point, and its shares of a fixed amount have under the Act to be issued for subscription simply in accordance with the provisions of the incorporated Acts, the company must either offer the shares for subscription on the terms of their being paid up as and when calls are made to the full nominal amount, or not offer them at all—though I express no opinion to this effect, and my silence must not in any way be taken as indicating that I consider the contention to that effect as sound. But in the present case the railway company is governed by the special Act of 1888, the provisions of which, in my judgment, shew that the company was not bound to issue its capital stock only on the terms of its being paid for to the full nominal amount. In the first place, the capital stock is not divided into shares at all, and is to be issued as already fully paid up, so that most of the arguments based on the sections of the *Companies Clauses Consolidation Act*, 1845, which I have mentioned above, do not apply to this case at all. But, beyond this, I think it is clear, from the Act of 1888, that the Legislature could not have contemplated that the capital stock could or would be sold at par. It appears to me that to hold that the directors of this railway company could only sell the stock for its full nominal amount would render the whole Act inoperative. The capital stock under the Act was only to be applied in paying for and carrying out the purchase of the railway and undertaking which formerly belonged to the *Potteries Company*, according to the terms of the scheduled agreement. To complete the purchase certain sums in cash had to be paid, which could only under the Act be raised by a sale of this capital stock (see sects. 27 and 31), and when the amount of that cash is compared with the nominal amount of capital stock provided for the purpose, it will be seen that the Legislature must have contemplated that the cash would probably have to be raised by the sale of a very much larger nominal amount of stock, and in fact, having regard to the then ruinous condition

C. A
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY
Romer, J

of the railway and the low value of the stock, the cash could not possibly have been raised except by a sale of the stock at a very reduced price. That the Legislature knew that the capital stock could not be of its full nominal value is further shewn by the following amongst other facts—viz., that part of the stock was, under the scheduled agreement, to be paid to the shareholders of the *Potteries Company* in respect of their interest in their old undertaking, and what the real value of their interest was may be gathered from the recitals in the two Acts of Parliament. In the Act of 1881, which authorized the *Potteries Company* to sell their undertaking, after recitals to the effect that the railway was out of repair and that there were no funds available to do necessary repairs, and that the railway had been closed to traffic since the 22nd of June, 1880, there is the following statement: "And whereas the shareholders of the company have no interest whatever in facilitating the reopening of the railway, as under no conceivable circumstances can receipts of the railway produce any dividend on their capital outlay." And in the Act of 1888 there is the following recital: "And whereas for many years the *Potteries Company* have been insolvent, and a receiver was in receipt of the tolls of their undertaking until the closing of the *Potteries Railway* to public traffic on the 22nd day of June, 1880." Shareholders in an insolvent company cannot be said to have an interest of the slightest value. Moreover, in the Act of 1888, not only is there nothing from which any person could gather that it was contemplated that the stock could or would be sold at anything like its full nominal amount, but there are significant indications to the contrary—as, for example, in sect. 15, which defines the capital of the company, where the *Shrewsbury* separate capital (which is the capital stock in question) is referred to as fully paid-up stock of a certain "nominal" amount, while the *Market Drayton* separate capital (which was further capital of the company, but which has never yet been raised) is defined as consisting of 30,000 shares of £10 each, no such word as "nominal" being used. For these reasons, I think that the first ground urged by the Plaintiffs fails. Another point taken by the Plaintiffs is so connected with the preceding one that I

deal with it here. It is said, and said truly, that the capital stock in question could only be issued so far as, and to the extent necessary, to carry out the scheduled agreement of purchase, and then it is urged that under the agreements impeached capital stock was issued for other purposes and to a greater amount than was authorized. But on investigation it appears to me that this contention fails. First, as to the amount: After providing for those payments which under the scheduled agreement had to be made in stock, there was left, out of the £350,000 stock, about £63,500 to provide for the payments in cash which had to be made to carry out the scheduled agreement, and which amounted to over £12,000. On the evidence before me I am satisfied that the whole of this £63,500, and more, was wanted to raise £12,000, or even a smaller sum. The Plaintiffs (no doubt very judiciously) gave no evidence on the point. But the evidence of Mr. *Whadcoat* was clear, and I see no reason to discredit or doubt his evidence, and in particular his evidence as to the small value of the capital stock, supported as it is by the documents before me and the other circumstances of the case, to some of which I have already alluded. Next, as to the purposes for which the stock was issued: I think that, in substance, it was issued under the agreements for the purpose of raising the money necessary to make the cash payments I have mentioned—which was a perfectly valid purpose, and sanctioned by the Act of 1888—and that the money so raised was applied for the required purpose. And I think it makes no difference that under the agreements impeached the stock and debentures were applied jointly in raising moneys, part of which had to be applied for the required purpose, and part for other purposes to which the stock could not be applied. I may further add that, as the railway company was authorized to sell and issue this stock, I do not see any valid reason why the company should not sell it and some of their debentures for a lump sum, or why the company should be obliged to apportion the purchase-money or to pass separate resolutions as to the sale of the stock and the sale of the debentures. It is also noticeable, with regard to both the above points, that the *Shropshire Railways Act*, 1891, refers in the recital to all the capital stock

C. A.
1893
WEBB
v
SHROPSHIRE RAILWAYS COMPANY
Romer, J.

then issued (including that now in dispute), as issued for the purposes of the purchase agreement scheduled to the Act of 1888. The next point taken is that the agreements were *ultrà vires* because under them debentures were obtained by the limited company at a discount; and the Plaintiffs' counsel argued that a railway company cannot sell or part with its debentures for cash except on terms of receiving the full nominal value of them. This is, in my judgment, an extraordinary contention to be raised at the present day, and one which a Court—certainly a Court of first instance—ought not, I think, to treat as now open for consideration. For a very long series of years it has been the practice of railway companies, when they thought fit, to issue their debentures or debenture stock for cash at less than their nominal amounts, where better terms could not be obtained. This practice has been open and notorious, and may be said to have received the tacit assent of the Legislature, since, so far as I am aware, no provision has been made prohibiting the practice in the numerous railway Acts that have been passed. To suggest now a doubt as to the validity of the practice would or might do incalculable mischief. Moreover, I am bound to say I have not heard in the arguments addressed to me, and I am not aware of, any sufficient reason why the practice should be held invalid. And, as to decided cases, it is remarkable that there is no distinct authority on the point, so far as the railway companies are concerned, which shews, I think, that until now it has always been considered clear that railway companies could validly issue their debentures or debenture stock at such price as they could obtain. But as to limited liability companies there are authorities (cited in argument) shewing that these companies could issue their debentures at a discount. It is true that in those cases some reliance has been placed on the use of the words, "Raise money by the issue of debentures," or equivalent phrases contained in the articles of association of the company. But if anything turns on this, I find in the case before me, in sect. 31 of the Act of 1888, the phrase, "Money raised by debenture stock or mortgages." (See also sect. 8 of the Act of 1891.) For these reasons, I think, the Plaintiffs fail also on this point.

There are then some minor objections raised to the agreements, which I must deal with. Amongst the provisions of the agreement of the 3rd of June, 1890, is one to the effect that the limited company may, to the extent of £20,000, pay to the railway company, not in cash, but in capital stock of the railway company; and it is said that this is *ultrà vires*, as it amounts to the railway company buying its own stock, which it is not authorized to do. No doubt, in form this provision is objectionable. But the circumstances must be looked at. At the date of this agreement there was a contract arranged between the railway company and a Mr. *Cutbill*, a contractor, and intended to be carried out simultaneously, under which *Cutbill* was to complete the railway and be paid part of the contract price in capital stock of the railway company, and this capital stock was intended to be supplied by the £20,000 stock above mentioned, so far as it would extend. It is true that a dispute subsequently arose between the railway company and *Cutbill*, and there is a question, which is the subject of a separate action now pending, whether or not any binding contract was ever come to between them. But I will assume for the purposes of this judgment that no binding contract was come to. Still, it was clearly contemplated by the agreement of the 3rd of June, 1890, that such a contract would be made, and made before the agreement could be acted upon (see, *inter alia*, clauses 2 and 15 of the agreement, and in particular the provisions of clause 2, at p. 4 of the printed agreement, under which the limited company were to pay £64,000—of which the £20,000 stock formed part—only in monthly instalments against the monthly certificates of the company's engineer as the contractor's works progressed, and so that each instalment should be for such an amount as should be sufficient to enable the company to discharge the monthly certificate of the engineer against which it should be paid). It was, therefore, clearly contemplated that the £20,000, or such part as should become payable, should in effect go, not to the railway company to hold, but to the contractor. And in fact, though the arrangement with *Cutbill* fell through, a contract for works to the same effect was made with another contractor, as contemplated by the agreement of the 3rd of

C. A.
1893
WEBB
v.
SHROPSHIRE RAILWAYS COMPANY.
Romer, J.

June, 1890, and then, and not till then, was any stock paid over by the limited company, and this stock went, as contemplated, to the contractor. So that this provision as to the £20,000 was not intended to operate, and has not in fact operated, in the railway company buying or acquiring any part of its issued stock. And, seeing that the agreement of the 3rd of June, 1890, is an executed agreement, and not a mere executory one, I certainly am not disposed, merely on the ground of this provision, to declare the agreements now wholly void. There is also another way in which the matter might be regarded so as to avoid all questions of *ultrà vires*—and it appears to me that, as the agreement has been acted upon so long, all reasonable intendments ought to be made by the Court in its support—and that is, to treat this amount of stock as struck out on both sides of the agreement, that is to say, both on the paying side and on the receiving side. This would leave the rest of the agreement and what has been done thereunder unaffected and unimpeachable as between the two companies. With regard to the ancillary suggestion that the agreement was unfair or improvident because it purported to make the railway company sell the stock at one price and buy it back at a greatly enhanced one, it will appear from what I have already said that this was not the real nature of the arrangement, though I agree that the wording is unfortunate and open to attack. I have no doubt the parties well knew that the limited company would, as of course, avail themselves of their option to pay the £20,000, not in cash, but in stock, and pay it over to the contractor, and made the general bargain on this footing; and on the fairness of the bargain as a whole I need not repeat what I have before said.

Another objection taken by the Plaintiffs to the agreements is that they purported, as alleged, to put the control of the railway company in the hands of the limited company, and, in particular, objection was taken to the financial conditions in the agreement of the 3rd of June, 1890. But it is clear, I think, that the agreements cannot in any fair sense be said to place the whole control of the railway company in the hands of the limited company, or to delegate to the limited company the powers and discretion of the railway company's directors

generally. All that can be said is that in some matters in which the limited company were vitally interested under the agreements, the railway company agreed to act only with the approval or assistance, or under the direction of the limited company. And, if any of the clauses be invalid or objectionable they are in favour of the limited company, and can be and are (if that be necessary) waived by the limited company, and cannot now be relied upon by the railway company, after the agreements have been acted upon, as invalidating them altogether, and, in particular, as invalidating the other parts of the agreements which are separable, and are the important ones, and in respect of which alone the Plaintiffs now seek active relief.

[His Lordship then considered certain other objections to the agreements, which need not be further referred to, and concluded by deciding that the action failed, and must be dismissed with costs.]

F. E.

C. A.

From this judgment the Plaintiff *Webb* appealed. The appeal came on for hearing on the 20th of June, 1893.

Sir *H. Davey*, Q.C., *Buckley*, Q.C., and *Dunham*, for the Appellant:—

The agreements were improvident so far as the interests of the shareholders in the railway company are concerned. Their effect was to give enormous profits to the bankers at the expense of the shareholders of the company, and to place the company entirely in the power of the bankers.

But we specially rest our case on the agreements being *ultrà vires* of the railway company. They had no power to issue either the stock or the debentures at a discount. With respect to the stock, the Act of 1888 did not contemplate such a thing. They had power to issue the stock, but there was no power given them to sell it either at par or at a discount. Nor is there any such power given by the *Companies Clauses Act*, 1845, or any Act amending it. There is no mention of the subject in the *Companies Clauses Act*, 1845, but there is a strong implication raised by the subsequent Acts that such a power was never intended to be given. By the 21st section of the *Companies Clauses Act*, 1863

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY

(26 & 27 Vict. c. 118), it was enacted that a company constituted under the *Companies Clauses Acts* might issue new shares and new stock upon such terms and conditions as the directors determine, but so that not less than the full nominal amount of such share or stock should be payable in respect thereof. Then, by the 27th section of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), this prohibition against issuing such shares or stock for less than the nominal value was removed as to railway companies. And by the 5th section of the *Companies Clauses Act*, 1869 (32 & 33 Vict. c. 48), the prohibition was removed as to all companies constituted under the *Companies Clauses Acts*. But there is no mention in any of those Acts of the issue of original shares or stock at less than their nominal amount, and the implication is very strong that this was never intended to be permitted. There is no authority which has declared it lawful, and the reasons for holding that joint stock companies incorporated under the *Companies Acts*, 1862 and 1867, are not authorized to do so apply equally to companies under the *Companies Clauses Acts*: *Ooregum Gold Mining Company of India* v. *Roper* (1). As to the special clause in the agreement respecting the £20,000 stock, that is in fact a clause empowering the company to re-purchase its own stock, and that too at an enormous premium. Such a clause must be *ultrà vires*.

With respect to the issue of debentures and debenture stock, there is only power to "borrow money," not to "raise money," by debentures. There is a distinction between the two expressions. In the first case the sum borrowed is the only liability; in the second the company may have power to make itself liable for a larger sum than is actually borrowed; which the company has done in this case. Such an act is *ultrà vires*: *West Cornwall Railway Company* v. *Mowatt* (2). At all events, if a company has power to borrow money at a discount, it can only do so after the directors have exercised their judgment as to the necessity of so doing under the circumstances of the case; but here, by an express clause, the company has delegated its discretion to the bankers. They have left the bankers to settle the terms of issue and have placed the business of the company entirely in their

(1) [1892] A. C. 125. (2) 17 L. J. (Ch.) 366.

hands. Such a clause is void: the company could not surrender the discretion of the directors to act as the circumstances at the time might require.

G. P. Macdonell, for the *Shropshire Railways Company*.

Sir *J. Rigby*, S.G., *Neville*, Q.C., and *Kirby*, for *Whadcoat Brothers & Co.*, the Defendants in the action of the *London Financial Association* v. *Whadcoat Brothers & Co.*:—

The agreements were not improvident as regards the interests of the railway company. The history of the company shews that it was in such a condition that it was impossible for the undertaking to be saved without such a scheme as that which was comprised in the agreement.

The objection raised against the option of paying the £20,000 in stock instead of in money is unfounded. The stock was not to go back to the railway company, but to the contractors who were constructing the railway. The bankers were merely conduit pipes by which the money or stock was to pass from the company to the contractors. Even if this clause was in form irregular it would not vitiate the whole agreement.

With respect to the power to issue stock at a discount there is no authority against nor any clause in the *Companies Clauses Acts* which negatives it. The Appellants contend that the enactments in the Acts of 1863, 1867, and 1869, respecting the issue of new stock and shares imply that the original stock could not be issued at a discount. But we contend that the implication is the other way. The reasons which have influenced the Court in holding that shares in ordinary joint stock companies cannot be issued at a discount, as in *Ooregum Gold Mining Company of India* v. *Roper* (1), have no application to stock in a railway company. But even if there was no power under the general Acts to dispose of stock below its nominal value, it is clear that it was contemplated in the special Acts in this case that this should be done, for it is admitted that the stock was worth very little in the market.

As to the debentures and debenture stock, the case is still

(1) [1892] A. C. 125.

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY

stronger in favour of the power to issue them at a discount. There is no authority against it, and their power to do so has never been doubted, and has been acted upon in numberless cases. It has been decided that debentures issued by companies incorporated under the *Companies Acts*, 1862 and 1867, may be so issued: *In re Anglo-Danubian Steam Navigation and Colliery Company* (1); *Campbell's Case* (2); *Mainland* v. *Upjohn* (3). If the company had power to issue stock and debentures at a discount, they had power to do all things and make all contracts ancillary to such issue.

Sir *H. Davey*, in reply.

1893. July 27. LINDLEY, L.J., delivered the judgment of the Court (*Lindley*, *Lopes*, and *A. L. Smith*, L.JJ.) as follows:—

This is an appeal by the Plaintiffs, holders of stock in the *Shropshire Railways Company*, against a decision of Mr. Justice *Romer*, and the question raised by the appeal is whether certain agreements entered into between the Defendants and Messrs. *Whadcoat* in June, August, and December, 1890, and relating to the construction or completion of certain railways, ought to be set aside, on the ground that such agreements are not warranted by the *Shropshire Railways Act*, 1888. A company called the *Potteries, Shrewsbury, and North Wales Railway Company*, or, more shortly, the *Potteries Company*, was formed in 1866, by a special Act (29 & 30 Vict. c. cci.), out of two previously existing companies, which were then dissolved. Their undertakings were united into one undertaking, which became the undertaking of the new company. The undertaking consisted of certain railways and works authorized by various Acts of Parliament and situate in the neighbourhood of *Shrewsbury*. The company thus formed was not prosperous. In 1868 a scheme of arrangement between the company and its creditors was entered into. In 1874 an extension of the company's railway was authorized. A receiver was in receipt of the tolls of the undertaking, but no interest was ever paid on the company's debenture stocks. The

(1) Law Rep. 20 Eq. 339. (2) 4 Ch. D. 470.
(3) 41 Ch. D. 126.

railway could only be kept going by neglecting necessary repairs, and in June, 1880, it was closed to public traffic. In 1881 an Act (44 & 45 Vict. c. clviii.) was passed for winding up the company. This Act, after reciting the history of the company and the state it was in, further recited as follows:—[His Lordship read the recitals in the Act of 1881, and stated the effect of sects. 3, 4, 6, and 8, as set forth above, and continued:—]

It is impossible to read this Act without seeing that one of its main objects was to have the railway reopened for traffic, and for that purpose to have it put and kept in a proper state of repair. In April, 1882, the company was ordered to be wound up, and in March, 1888, an agreement for the sale of the undertaking to the promoters of the *Shropshire Railways Company* was entered into. This agreement is set out in the schedule to the *Shropshire Railways Act*, 1888 (51 & 52 Vict. c. cxcii.), to which it is necessary to refer at some length. Before doing so I will point out that the agreement for sale entered into by the liquidator could not be carried out without further statutory authority, because the railway company, who were to purchase the undertaking of the *Potteries Company*, which its liquidator was empowered to sell, had not been itself created, and did not in fact exist. The *Shropshire Railways Act*, 1888, refers again to the state of the *Potteries Company*; to the closing of its railways and branches in 1880; and to the Act of 1881 and the proceedings under it, and then follow recitals which I will read. [His Lordship read the recitals in the Act of 1888 as set forth above, and continued:—]

Here again we find the reopening of the *Potteries Railway* for public traffic one of the main objects sought to be attained by the legislation. The means of attaining this end were the formation of a company to carry out the scheduled agreement. The Act accordingly incorporates, by sect. 4, a new company (the Defendant company), and makes the scheduled agreement binding on it (sect. 5), but the liquidator is empowered to accept fully paid-up stock in the new company instead of cash, as under the Act of 1881. But the costs and expenses of obtaining land are not to be paid in stock, unless the payees are content to take

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY.

it instead of cash (sect. 5). This is the short effect of sect. 5, which is as follows. [His Lordship read the section.]

Passing over these sections which relate to the construction and completion of works, it is necessary to examine the financial powers of the new company. For financial purposes the new company's undertaking is divided into two—viz., "the *Shrewsbury* separate undertaking," and "the *Market Drayton* separate undertaking" (sects. 14 and 15). The former only has to be considered in this case. Its capital is not to exceed £350,000, consisting of fully paid-up stock to such nominal amount, not exceeding the above sum, "as may be necessary or convenient for the company to create and issue for the purposes of and in accordance with the scheduled agreement" (sect. 15). In addition, however, to this fully paid-up stock, the company is empowered (by sect. 27) to borrow, on mortgage of the *Shrewsbury* separate undertaking, any sum not exceeding £100,000, "when and so soon as the *Potteries Railway* shall have been transferred to and vested in the company under the provisions of this Act and of the Act of 1881." By sect. 30, debenture stock may be issued instead of mortgages. So far the funds at the disposal of the company for the purposes which have to be considered in this case are (1.) £350,000 fully paid-up stock, and (2.) £100,000 debentures or debenture stock; but there is nothing in the Act relating to the rate of interest or dividends which these funds may bear, nor to the price at which they may be issued. Nor, so far, is there anything in the Act to preclude the company from raising money by whichever mode is most convenient, nor anything to prevent the company from applying the money raised in any way they think proper, provided only that they apply it for the purposes of the *Shrewsbury* separate undertaking, and that alone. But sect. 31 goes on to say how these moneys are to be applied. [His Lordship read the section, and continued:—]

Now, it will be observed that, although the Act says that the money raised by debenture stock or mortgages shall be applied only in making certain payments, there is no restriction on the application of the capital stock, except that it must be confined to the purposes of the *Shrewsbury* separate undertaking. More-

over, even as regards the debenture stock or mortgages, the general words at the end of sect. 31, clause A, authorize the company to apply money borrowed, not only for the purposes previously specified, but also "otherwise for the purposes of the *Shrewsbury* separate undertaking." The only other provisions relating to this subject are to be found in clauses 4 and 5 of the agreement in the schedule. [His Lordship read the clauses in the agreement set forth above, and proceeded:—]

The Appellants contend that under these Acts and the agreement the company have no power to raise money by the sale of fully paid-up capital stock of the company, or, at all events, no power to issue such capital for less than its full nominal value, and no power to pay for completing their railways and putting them into proper repair and condition by means of the capital stock. It is further contended that the company cannot issue debenture stock or mortgages for less than their nominal value, or, at all events, without fixing its price. We are unable to adopt any of these conclusions. As regards the fully paid-up stock, there is no principle or authority for saying that a company governed by the *Companies Clauses Consolidation Act*, 1845, and the Acts amending it, cannot issue fully paid-up stock for what they can get for it. Fully paid-up stock is very different from shares liable to calls. Whether shares in companies governed by the *Companies Clauses Consolidation Act*, and liable to calls, can be issued at a discount need not be decided on the present occasion. But the holders of stock issued as fully paid up under statutory powers are under no liability to creditors, and can have no calls made upon them. The *Companies Acts*, 1862 and 1867, have no application either to companies governed by the *Companies Clauses Consolidation Act*, 1845, or to fully paid-up stock issued under the provisions of the special Act incorporating it. There is nothing in law to prevent a company from issuing such stock for cash, or in payment for land bought or materials provided, or for work and labour, or in payment of services; nothing *ultrà vires* in an agreement by the company to pay for such things in fully paid-up stock, taken at such a price as the company and those dealing with them can agree upon. Whether directors can in any particular case be made personally

C A
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY

responsible for wasting the assets of the company by issuing fully paid-up stock for less than its market value is a very different matter. Similar observations apply to the issue of debentures or mortgages, and, notwithstanding the distinction attempted to be drawn between borrowing money on mortgage and raising money on mortgage, we can find nothing in this Act of 1888 which introduces any special restriction on the power given to raise money for the purposes of the Act by creating and issuing mortgages or debenture stock. The authorities which shew that debentures can be issued at a discount—*e.g.*, *Campbell's Case* (1)—are, in our opinion, as applicable to this company as to companies governed by the *Companies Act*, 1862, to which those decisions more particularly relate. Of course, if the special Act of 1888 had prohibited the issue of the fully paid-up capital for any particular purpose, the company could not lawfully issue it for that purpose. But we can find no prohibition against the issue of paid-up capital for any purpose of the *Shrewsbury* separate undertaking. It would be to impose upon the company a restriction not to be found in the Act, and in the result to defeat one of the main objects of the Act, if we were to hold that the company could not issue its fully paid-up stock for the purpose, amongst other things, of doing what might be necessary for reopening the *Potteries Railway* to public traffic.

This conclusion really disposes of this appeal. The agreements sought to be set aside cannot be held *ultrà vires* the company if the Act of 1888 is construed, as we are of opinion it ought to be construed, not narrowly, as contended by the Appellants, but fairly with reference to its declared objects, and if the law relating to the issue of fully paid-up stock and of mortgages or debenture stock is what we have stated it to be. We forbear, therefore, to examine those agreements in detail. The short effect of them is that the *Shropshire Railways Company* were to be financed by *Whadcoat Brothers, Limited*, who are bankers. By the first agreement, of the 3rd of June, 1890, the bankers were to pay to the company £79,500, £20,000 of which might be in stock of the company. The company, on the other hand, were to pay to the bankers £173,200 in debentures

(1) 4 Ch. D. 470.

and fully paid-up stock—*i.e.*, £90,200 in debentures, to be issued under the Act of 1888, £53,000 in fully paid-up stock, and £30,000 in other debentures, for leave to create which application was to be made to Parliament. If authority could not be obtained to issue them, cash was to be paid to the bankers instead of them. By the second agreement, of the 1st of August, 1890, £5000 in debentures and £5000 stock were to be paid to the bankers in consideration of their paying £5000 earlier than they had agreed to do, and not against engineer's certificates, as previously agreed. By the third agreement, of the 10th of December, 1890, a further modification of the agreement of June was made, and further payments were to be made to the bankers for further accommodation by them. It is obvious from these agreements that the payments to be made by the railway company to the bankers in capital stock and debentures were calculated upon the footing that the capital stock and debentures were worth very much less than their nominal value. We were told that they were issued at a discount of something like 60 per cent. Onerous, however, as these terms apparently were, we have no reason to doubt that they were the best terms which could be made under the circumstances, and under the difficulties with which the company had to grapple. On this part of the case we cannot usefully add anything to the observations of Mr. Justice *Romer*. A point was made that the company agreed first to sell and then to repurchase £20,000 of its own stock, which, it was urged, was plainly *ultrà vires*. The answer, however, is that no such purchase was really contemplated, nor has the company in fact purchased its own shares. The £20,000 stock has gone to the contractor through the bankers. Even if the agreement as to the £20,000 had been to the effect suggested, so that the agreement might have been set aside on this ground before it had been acted upon, yet, if in point of fact the agreement has been carried out without any purchase by the company of its own stock, the Court could not afterwards usefully or properly interfere. The attack on the agreement, so far as it is based on this ground, would be too late, even if it might have succeeded earlier. By means of those agreements the company have in fact purchased and acquired the

C. A.
1893
WEBB
v.
SHROPSHIRE
RAILWAYS
COMPANY.

undertaking of the *Potteries Company*, and have put the railways of that company into good working order, and have constructed part of the new railway authorized by the Act of 1888. In 1891, the company obtained further powers by another Act, reciting what had been done under the Act of 1888. It is true that this Act of 1891 does not refer to the impeached agreements, and cannot be relied on as confirming them. It would, however, be extremely difficult, if not impossible, to set those agreements aside now on any terms which would be just and equitable. But, assuming that this difficulty could be surmounted, and apart altogether from it, we have come to the conclusion that the agreements were not *ultrà vires*, and the appeal must therefore be dismissed with costs.

Solicitors: *Tarry & Sherlock; Bircham & Co.; Stretton, Hilliard, Dale & Co.*

M. W.

C. A.
1893
July 24;
Aug 3.

In re PLENDERLEITH, A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION.

Lunatic—Maintenance—Charging Order.

The Court will order a proper allowance for the maintenance of a lunatic to be made out of the income and capital of a fund in Court belonging to him, though the effect may be to make the capital insufficient for the payment of creditors of the lunatic who have obtained charging orders on the fund, and such creditors are not entitled to have impounded an amount of capital sufficient to meet their demands.

ON the 6th of April, 1892, an order was made under sect. 116 of the *Lunacy Act*, 1890, empowering *John Plenderleith*, a brother of *Robert Elliot Plenderleith*, who was of unsound mind, but not so found by inquisition, and whose property was less than £2000, to sell and get in the personal estate of *R. E. Plenderleith*. The moneys got in were to be paid into Court and invested in Consols.

In November, 1892, *Bolitho & Co.* commenced an action against *R. E. Plenderleith* as acceptor of certain bills of ex-

change, and on the 16th of February, 1893, recovered judgment against him for £121 10*s.* debt, and £12 5*s.* 6*d.* costs.

In November, 1892, the executors of *J. H. Collins* commenced an action against *R. E. Plenderleith* for goods sold and delivered, and on the 17th of February, 1893, recovered judgment for £99 2*s.* 2*d.* debt, and £11 0*s.* 8*d.* costs.

The receiver having got in the personal estate, there was standing in Court to the credit of this matter the sum of £784 8*s.* 10*d.* New Consols, which, so far as appeared, was *R. E. Plenderleith's* only property.

On the 20th of June, 1893, an order in *Bolitho* v. *Plenderleith*, referring to the judgment of the 16th of February and to the above sum of stock, directed "that the Defendant's interest in the said fund so standing as aforesaid stand charged with the payment of the above-mentioned amount due on the said judgment." On the same day a similar order was made in *Collins* v. *Plenderleith*.

In May, 1893, *John Plenderleith* took out a summons asking that £50 per annum, as from the 15th of May, 1893, might be allowed for the maintenance and support of *R. E. Plenderleith*, who was then in a lunatic asylum, where he was maintained at an expense of £40 a year, the extra £10 being required for clothes and other incidental expenses. This summons came on before the Master to be disposed of on the 18th of July, notice having been given to *Bolitho & Co.* and the executors of *Collins*. The Master approved of a scheme allowing £50 a year for maintenance, and directing that, notwithstanding the charging order, a portion of the Consols should be sold half-yearly sufficient to make up the deficiency of the dividends.

The case, being considered to be of great importance, was adjourned into Court to be disposed of by the Lords Justices, and was heard on the 24th of July, 1893.

W. D. Rawlins, for the judgment creditors:—

There is no doubt a series of cases from very early times in which the Court in Lunacy has dealt with the property of lunatics without regard to the rights of unsecured creditors. These cases probably arose in consequence of the then state of

C. A.
1893
In re PLENDERLEITH, A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION.

the law, which gave no protection to a lunatic debtor, so that if his creditors exhausted his property he might starve. In the present day abundant provision is made for pauper lunatics, so that there is at all events no reason to extend the law, and it is an extension to apply it to secured creditors, who have a specific title to the fund. Moreover, the decisions in Lord *Eldon's* time appear to have gone much on the ground that the property which it was sought to affect was property which the creditor could not get at by process of law. But now a creditor can get at stock by a charging order, and it was decided in *Horne* v. *Pountain* (1) that a charging order on stock in Court standing to the account of a lunatic can be made, and this was approved of in *In re Leavesley* (2). If this had been a leasehold the judgment creditors could have taken out execution, and the Court cannot interfere with the legal rights of a creditor because the debtor is a lunatic: *In re Ball* (3).

[LINDLEY, L.J.:—It would appear from Mr. *Norton's* argument in *In re Leavesley* (4), that the Lords Justices did not make any order for payment in *In re Pountain*. What order do you ask?]

I ask that a competent part of the fund to meet the claims of the judgment creditors should be set apart and not touched. I do not object to the income being applied for the lunatic's benefit. The present scheme will exhaust the fund in about fifteen years if the lunatic lives so long. He will then become a pauper lunatic, and the scheme will have deprived the judgment creditors of their debts for the benefit of nobody but the rate-payers, at whose expense pauper lunatics are provided for.

Clydesdale, appeared in support of the scheme; but the Court adjourned the case to see what had been done in *In re Pountain*, saying that they would, if necessary, hear him when the case was mentioned again.

1893. Aug. 3. LINDLEY, L.J.:—

On the 6th of April, 1892, an order was made in Lunacy under sect. 116 of the *Lunacy Act*, 1890, appointing a receiver of the

(1) 23 Q. B D. 264.
(2) [1891] 2 Ch. 1.
(3) 2 Mol. 145.
(4) [1891] 2 Ch. 3.

lunatic's property. Money belonging to him was brought into Court and invested in £784 Consols. In February, 1893, a creditor of the lunatic obtained judgment against him in an action commenced in November, 1892, and defended by a guardian *ad litem*. In June, 1893, an order was obtained in the action charging the above-mentioned Consols then in Court with the amount of the judgment.

The Master in Lunacy has sanctioned a scheme for his maintenance out of income and capital, and the judgment creditor objects unless enough capital is preserved for his payment. The question is whether he is entitled to have a portion of the capital impounded for his benefit in obedience to the charging order.

But for the charging order, it is clear that the creditor would have no right to be paid out of the lunatic's estate in Court or under the protection of a Judge in Lunacy. This is plain from *In re Pink* (1) and a long series of older authorities; and in *In re Pountain* (2) the Court appointed a receiver to protect the property of a lunatic not so found by inquisition against (*inter alia*) execution by a judgment creditor. The moment a lunatic's property is subject to the jurisdiction of this Court in Lunacy, this Court has to determine how that property is to be applied, and rule 30 empowers the Master to inquire what debts are due and whether they ought to be paid. In considering this question, not only the rights of the creditors but the benefit of the lunatic have to be considered; and if the creditors cannot get paid without invoking the aid of the Court in Lunacy the Court has always refused such aid if to grant it would be to reduce the lunatic to the condition of a pauper.

A charging order does not in my opinion deprive the Court of its jurisdiction in these respects. The effect of a charging order against a lunatic was carefully considered by this Court in *In re Leavesley* (3); but there the lunatic was dead, and after his death the Court gave effect to the order as against his executors. The Court, however, carefully abstained from expressing any opinion on what would have been done in his lifetime. In *Pountain's Case*, referred to in *In re Leavesley* (4), however, the

(1) 23 Ch. D. 577.
(2) 37 Ch. D. 609.
(3) [1891] 2 Ch. 1.
(4) Ibid. 3.

C. A.
1893
In re PLENDERLEITH, A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION.
Lindley, L J

Court had to deal with the very point before us. In *Horne* v. *Pountain* (1), a judgment creditor of a lunatic obtained a charging order upon a fund standing to the credit of the lunatic in the books of the paymaster of the Chancery Division. The judgment creditor applied in Lunacy for payment, but his application was refused. The statement in the LAW REPORTS (2) proves to be correct. This I have ascertained from the registrar's book. From a note in that book, however, it appears that the order sought to be enforced may have been the order made in Chambers, and not the order as rectified by the Divisional Court. But inasmuch as the Lords Justices had before them the order of the Divisional Court which is recited in their own order, I cannot think that their refusal to order payment was based upon so technical a mistake, which might have been at once put right by an amendment. Considering that there is nothing to prevent the creditors of lunatics from suing them and obtaining judgment against them, and from afterwards obtaining charging orders against their stocks, shares, and securities, it is obvious that if the Court in Lunacy is bound to pay such creditors out of funds under its control, lunatics who are in debt will in effect be deprived of the care and control of the Court, and be at the mercy of their creditors. This has never been the law, and if such a change in the law is desirable it must be made by Parliament and not by judicial decision.

The charging orders will remain for what they are worth. If the lunatic dies or recovers they may become available. But their existence does not deprive this Court of its power to dispose for the benefit of the lunatic of the funds under its control, and belonging to him when the charging orders were obtained.

There will be no order, therefore, on this application.

LOPES and A. L. SMITH, L.JJ., concurred.

Solicitors: *Robbins, Billing & Co.*, agents for *Paige & Grylls, Redruth; Coode, Kingdon, & Cotton*, agents for *T. C. Peter, Redruth.*

(1) 23 Q. B. D. 264. (2) [1891] 2 Ch. 3.

H. C. J.

In re ARMITAGE.
ARMITAGE *v.* GARNETT.

C. A.
1893
Aug. 4.

[1892 A. 7305.]

Company—Profits—Income or Capital—Tenant for Life and Reversioner.

A testator gave his estate upon the usual trusts for conversion and investment, with a power to postpone conversion, and a direction that during the interval all income produced by the property in its actual state should be treated as income for the purposes of his will. He bequeathed one-third of the residue to *A.* for life, and after her death upon further trusts. Part of the residue consisted of £10 shares in a company with £8 per share paid up. Some years after the testator's death the company was wound up and reconstituted, and the new company paid for the testator's shares £9 5*s.* apiece, being £1 5*s.* per share more than had been paid up. This excess arose from two funds. One of them consisted of profits which the directors had retained to meet contingencies. The other was a fund which by the articles was created by retaining the excess of dividend over £10 per cent. in every year in which it exceeded that amount, and was to be applied in making up the yearly dividend to £5 per cent. in any year in which it should fall short of that amount:—

Held (by the Vice-Chancellor of the County Palatine), that the £1 5*s.* per share on the shares to the income of which *A.* was entitled belonged to her as income.

Held, on appeal, that the right of a tenant for life of shares is only to receive dividends and bonuses in the shape of dividends declared during his life, and that the £1 5*s.* per share, though it was profits, was not income to which the tenant for life was entitled, but must go as capital.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine holding the excess of the amount per share paid to old shareholders of a company on its reconstruction above the amount paid up upon the share, to belong to a tenant for life as income.

Elkanah Armitage, by will dated the 17th of November, 1886, gave his estate to trustees upon the usual trusts for conversion, and directed them to stand possessed of one equal third share of the net residue upon trust to invest it and pay the income to his daughter *Catherine Sugden Garnett* for life for her separate use without power of anticipation, and after her death upon trusts for the benefit of her children and issue, and on failure of those trusts then as to one-third of that third upon trust for

C. A.
1893
In re ARMITAGE ARMITAGE v. GARNETT.

William Sugden Armitage absolutely, and as to the other two-thirds of it upon trust for the children of *William Sugden Armitage*. The will empowered the trustees to postpone the sale, conversion, and collection of all or any part of the testator's real and personal estate so long as they should deem proper, subject to provisions that his real estate should be considered as personalty from the time of his death, and that during such postponement the trustees might manage and let upon lease, for terms not exceeding twenty-one years, or from year to year, and cultivate, his real and leasehold estates, and make out of the income or capital of his real and personal estate any outlay which they might consider proper for improvements, repairs, insurance premiums or policies, or otherwise for the benefit of his estate. And he declared that the net rents and profits or other income produced from every or any part of his real or personal estate previously to the conversion or collection thereof should be applied in the same manner in all respects as if the same were income arising from investments thereinbefore authorized, and that all income produced by his estate in its actual condition for the time being, whether consisting of investments of an authorized or unauthorized description and whether of a wasting or permanent character, should as well during the first year after his death as at all times afterwards be applicable as income under the trusts of that his will, no part thereof being in any event liable to be retained as capital; but no property not actually producing income which should form part of his estate should be treated as producing income or as entitling any party to the receipt of income.

The testator died in June, 1887, and was at his death the holder of 625 shares of £100 each with £80 per share paid up in *Sir Elkanah Armitage & Sons, Limited.* The executors sold 155 of them. After this, in May, 1889, the shares in the company were by special resolution converted into £10 shares with £8 paid up. The testator's remaining shares were accordingly converted into 4700 shares of £10 each with £8 paid. The executors afterwards sold 250 of them, leaving 4450.

On the 11th of June, 1890, a new company was formed for the purpose (*inter alia*) of buying up the business and assets of the

old company. Special resolutions were passed for the voluntary winding-up of the old company, and the liquidator agreed to sell the assets and business of the old company, with some exceptions, to the new company for £237,001 14*s.* 4*d.* After adding the value of the excepted assets the total amount was £259,387 5*s.* This sum apportioned among the shares gave £9 5*s.* 6½*d.* per share, being £1 5*s.* 6½*d.* per share more than the amount paid up. The testator's executors received the £9 5*s.* 6½*d.* per share in respect of the testator's shares.

The question was then raised whether, as between the tenant for life and the persons entitled in reversion to the above-mentioned one-third of the residuary estate of the testator, this £1 5*s.* 6½*d.* was to be considered as income belonging to the tenant for life or as capital.

The old articles of association, which were in force at the death of the testator and until September, 1889, contained the following clauses:—

"115. Whenever in any year the net profits available for dividend shall exceed £10 per cent. per annum on the paid-up capital the surplus profits over such £10 per cent. shall be carried to a fund to be called the 'Reserve Dividend Fund,' and the dividends payable to the members shall not exceed £10 per cent. per annum on the amounts paid up or deemed to be paid up on their shares respectively until the 'Reserve Dividend Fund' shall amount to £20,000. But whenever the 'Reserve Dividend Fund' shall amount to £20,000 the whole of the net profits shall, if the governing directors, or failing them the board, think fit, to be available for dividend.

"116. In case the profits available for dividend in any year shall be less than £5 per cent. per annum, then such a sum as may be requisite to make up such dividend to five per cent. per annum shall be taken for that purpose from the 'Reserve Dividend Fund,' but if such fund shall not be sufficient to make up the dividend to five per cent. then the whole of the fund may be devoted towards supplementing the dividend so far as it will extend.

"117. Whenever the 'Reserve Dividend Fund' shall be reduced below the said sum of £20,000 by the withdrawal from it

C. A.
1893
In re
ARMITAGE
ARMITAGE
v.
GARNETT

of sums for the purpose of making up dividends as aforesaid, then no dividend of more than £10 per cent. per annum shall be paid until the 'Reserve Dividend Fund' shall again amount to £20,000."

By a special resolution, confirmed on the 18th of September, 1889, new articles of association were substituted for the original articles. These new articles contained the following clauses :—

"82. The board may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to the amounts paid up or deemed to be paid up on their shares respectively.

"83. No dividend shall be payable except out of the profits arising from the business of the company.

"84. When, in the opinion of the board, the profits of the company permit, interim dividends may be declared by the board on account of the dividend for the current year.

"85. The board may before recommending any dividend set aside out of the profits of the company such sum as they think proper as a reserve fund to meet depreciation on machinery, or for repairing and maintaining the premises and plant of the company, or for meeting contingencies and for such other purposes as the board shall in their absolute discretion think conducive to the interests of the company, and the board may invest the several sums so set apart upon such investments (other than shares of the company) as they may think fit, and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and divide the reserved fund into such special funds as they think fit, with full power to employ the assets constituting the reserve fund in the business of the company, and that without being bound to keep the same separate from the other assets."

"90. Whenever in any year the amount available for dividend shall exceed £10 per cent. per annum on the paid-up capital together with the income tax payable thereon, the surplus of such amount over such £10 per cent. and income tax shall be carried to a fund to be called the 'Reserve Dividend Fund,' and the dividends payable to the members shall not exceed £10 per

cent. per annum on the amounts paid up or deemed to be paid up on their shares respectively until the 'Reserve Dividend Fund' shall amount to £30,000; but whenever the 'Reserve Dividend Fund' shall amount to £30,000 the whole of the net profits shall if the board think fit be available for dividend.

"91. In case the profits available for dividend in any year shall be less than £5 per cent. per annum, then such a sum as may be requisite to make up such dividend to five per cent. per annum shall be taken for that purpose from the 'Reserve Dividend Fund'; but if such fund shall not be sufficient to make up the dividend to five per cent. then the whole of the fund may be devoted towards supplementing the dividend so far as it will extend.

"92. Whenever the 'Reserve Dividend Fund' shall be reduced below the said sum of £30,000 by the withdrawal from it of sums for the purpose of making up dividends as aforesaid, then no dividend of more than £10 per cent. per annum shall be paid until the 'Reserve Dividend Fund' shall again amount to £30,000."

At the death of the testator the reserve dividend fund amounted to £14,813 13*s.* 1*d.*; but at the date of the resolution to wind up the old company in June, 1890, it amounted to £19,969 11*s.* 1*d.* At the date of the resolution the reserved fund, which was entered in the company's books under the head of "Profit and Loss," amounted to £17,078.

The trustees of the testator's will presented a petition to have the question determined, and Vice-Chancellor *Bristowe* held that the £1 5*s.* 6½*d.* per share belonged to the tenant for life (1). The persons entitled, subject to the life estate, appealed.

(1) 1892. July 27. BRISTOWE, V.C., after stating the facts of the case, proceeded as follows:—

Nobody can doubt for a moment in regard to the profit and loss account that the profits would go to the tenant for life, and therefore that disposes of the profit and loss account. But then comes the question about the "Reserve Dividend Fund." Now the argument addressed to me by Mr. *Astbury* is that it is capital. Well, in my view of it, the contract itself denies and destroys that argument entirely as clearly and determinately as it can. It says that the fund shall be a "Reserve Dividend Fund," and that it shall be reserved to make up the dividends to £5 per cent. when they fall below that sum, and you cannot

C. A.
1898
In re ARMITAGE
ARMITAGE
v.
GARNER.

Levett, Q.C., and *Sebastian*, for the appeal:—

If these shares had been sold in the market by the executors, it is clear that no part of the price would have gone to the tenant for life as income, and we contend that what has taken place is substantially a sale by each shareholder of his shares. Suppose the shares had sold for less than the amount paid up

therefore take that fund as capital. If there had been any attempt to take this fund, and to treat it as an addition to or an increase of the capital of the concern, would not any shareholder who liked to have a buffer fund between himself and a bad dividend have said, "Oh, no, you must not take that and treat it as capital, because it is only applicable for dividend; it is a fund specially set apart under Art. 116 in the old company, or Art. 91 in the new company, to equalize the dividends, and it is to go to dividend and to nothing but dividend, and therefore you cannot treat it as capital"? Then, if that be so, I think on the question of division it falls within *In re Bridgewater Navigation Company* ([1891] 2 Ch. 317), which it is not necessary to refer to in detail. Then the only question which arises is the one which Mr. *Astbury* has mentioned, viz., that there has been no declaration of dividend. In one sense there can be no declaration of dividend, because the company was at an end. It was not in a position to declare a dividend for a moment, but it was bound to distribute the assets belonging to the company in such a way as the company by their contract, in other words, by their partnership articles, had agreed that the funds should be divided. The liquidator, finding a fund which is called the "Reserve Dividend Fund," says, and in my judgment, rightly says, "This fund must go to dividend and not to capital"—and it must go to dividend in what way? It cannot be, as Mr. *Astbury* says, that you must go back to the time when it was earned, because it would be next to impossible to find that out now. The reserve fund may have changed every year, and it may have been drawn upon from time to time in order to enable the company to pay a dividend. I do not know how the account stands, and it would be all but impossible to ascertain that information. It is a buffer fund charged to dividend account. When it becomes divisible, it must go to the persons entitled to dividend, and not to the persons entitled to capital at all, and therefore when this fund comes to be divided it must be divided as dividend. And it is divisible as dividend simply for this reason, that the origin and meaning and intention of putting a buffer fund there and keeping it in existence no longer exists; so then you give the money to the persons who are entitled to dividend.

In my judgment the tenant for life is entitled to the whole of the fund, whether it be met from the profit and loss account or from the division of this "Reserve Dividend Fund." In my judgment the directors of the company while the concern was going could have taken and dealt with the whole of this fund if necessary in order to pay dividends up to 5 per cent. It is money available for dividend only, and goes to the tenant for life.

upon them, could it have been contended that still part of the purchase-money must be paid to the tenant for life because the purchase-money was increased by the existence of a fund arising from undistributed profits. The law as to the power of companies to make money capital or income, is summed up in *Buckley* on Companies (1). In *Bouch* v. *Sproule* (2) the law as there laid down, and by the Court of Appeal in the same case, was approved. The House of Lords only took a different view of the facts.

[LINDLEY, LJ.:—It will be urged against you here that the company had no power to turn profits into capital.]

The Vice-Chancellor has made this mistake, that the tenant for life is entitled to profits. He is not, he is only entitled to the dividends which the company declares during his life. As regards the "Reserve Dividend Fund," the directors never had power to divide any part of it as dividends, for the dividends never fell below £5 per cent. As to the reserved profit and loss fund, they could at any time have divided it as dividend if they thought fit, and if they had done so during the tenancy for life the tenant for life would have got that dividend on these shares; but if they divided it after the death of the tenant for life he would get nothing.

[LOPES, L.J.:—The company has no power to make it capital.]

We say that everything is capital, except what the directors divide as dividend; the tenant for life is entirely dependent on the action of the company in declaring dividends. The case as to the reserved dividend fund is stronger than that as to the profit and loss fund, there being an express bargain that it shall not be divided as dividend except in an event which has not happened, and has become impossible.

Byrne, Q.C., and *Maberly*, for the tenant for life:—

The sums standing to the profit and loss account never were capital, and nothing has occurred to make them so, unless the sale by the liquidator has done so. Whatever the company has after replacing the paid-up capital is profit, and divisible as

(1) 6th Ed. p. 512. (2) 12 App. Cas. 385, 397.

C. A.
1893
In re ARMITAGE.
ARMITAGE v. GARNETT.

such: *Lubbock* v. *British Bank of South America* (1). The Appellant says that the tenant for life has no right to anything but to receive dividends. He has more than that: he has an equitable claim on the profits and a right to prevent their misapplication. If the executors had sold the shares, the whole purchase-money would no doubt have been capital; but they have not sold the shares; the liquidator has sold the whole concern, and in distributing the proceeds he ought to attribute so much as arose from capital to capital, and so much as arose from profits to profits. Now the testator says that if the property is retained the tenant for life is to have the profits, and this £1 5*s.* 6½*d.* is profit. The principle of *Bouch* v. *Sproule* (2) is that profits remain profits unless and until the company having power to do so makes them capital. Suppose an agreement that the profits on certain shares shall belong to *A. B.*, and then a sale like the present one takes place, surely *A. B.* can claim a part of the purchase-money to compensate him for the loss of the dividends. When the tenant for life loses the high dividend which was paid, is he to have no interest in the fund which arose from profits? Subject to the wants of the company, the profits were money held for the tenant for life.

[LOPES, L.J.:—Some shares were sold before this sale by the liquidator; the whole purchase-money is capital. Why should not the proceeds of a sale by the liquidator go the same way?]

The observations of Lord *Bramwell* in *Bouch* v. *Sproule* (3) are against treating profits as capitalized. The case of *In re Bridgewater Navigation Company* (4) is in our favour, and the observations of Lord Justice *Lindley* there are applicable to the profit and loss fund.

LINDLEY, L.J.:—

In this case I do not feel much difficulty, and I think the Vice-Chancellor has made a mistake.

The question we have to determine is, Who is entitled to the sum of £1 5*s.* 6½*d.* per share upon 4450 shares which belonged to

(1) [1892] 2 Ch. 198.
(2) 12 App. Cas. 385.
(3) 12 App. Cas. 405.
(4) [1891] 2 Ch. 317.

the estate of the testator, those shares being shares in a company which was wound up and re-constructed?

We must first look at the testator's will. He does not specifically mention these shares; they form part of the residue of his property, which he directs to be converted and invested. He divides the residue into thirds, the income of one of which is given to a tenant for life. Then the will gives authority to the trustees to postpone the sale or conversion of any part of his estate and to manage his landed property, and then he declares that the net rents and profits or other income produced by any or every part of his real or personal estate previously to the conversion or collection thereof should be applied in the same manner in all respects as if the same were income arising from the investments thereby authorized, and that all income produced by his estate in its actual condition, whether consisting of investments of an authorized or unauthorized description, and whether of a permanent or wasting character, should be applicable as income. That last clause is put in of course with a view to the doctrine laid down in *Howe* v. *Earl of Dartmouth* (1).

The short effect of that will is this—one-third part of these shares is held by trustees upon trust to pay the income to the tenant for life, and subject thereto in trust for the remainder-man. Now, is this £1 5*s.* 6½*d.* income within the meaning of that trust?

How does this £1 5*s.* 6½*d.* per share arise? It arises in this way. The shares were £10 shares, with £8 paid up upon them. The company was wound up, and the assets of the company were distributed amongst the registered shareholders, and each registered shareholder got £9 5*s.* 6½*d.* instead of £8—that is to say, upon the distribution of the assets there was an excess of £1 5*s.* 6½*d.*, whether profits or capital I will not at present say, over the £8 paid up in respect of each share. It arose apparently in this way: the assets of the company consisted among other things of about £20,000 standing to a reserved dividend fund, and of £17,000 standing in the books of the company, and representing undivided profits in addition to the reserved dividend fund. Those undivided profits of course could have been divided

(1) 7 Ves. 137.

C. A
1893
In re ARMITAGE
ARMITAGE
v.
GARNETT.
Lindley, L.J.

as dividends if the company had so thought fit. The £20,000 was applicable to the equalization of dividends. The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares. That is what he has done.

Now, there has been a great discussion about the nature of this £1 5*s.* 6½*d.* as to whether it is capital or income, and whether it is profit. I should say it is profit. When a person gets out of a concern more than he puts into it the difference is profit. If I put £100 into a concern and get out £105, I get £5 profit. In that sense of the word this £1 5*s.* 6½*d.* is profit, being the excess of the money produced by the sale of the investment over the amount of money invested. But is it income to which the tenant for life is entitled? That is a totally different matter, and I say that it clearly is not. What does a man mean when he leaves shares to a tenant for life? He means that that tenant for life shall have the income arising from the shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense. He does not mean him to have such profits, for example, as arise by a realization of shares; he never dreamed of such profits going to the tenant for life. What he means is, that the tenant for life shall have the income derived from the dividends or bonuses declared by the company; and when you ask me whether this £1 5*s.* 6½*d.* is income payable to the tenant for life, it seems to me as plain as possible that it is not, although it is profit in the sense I have just explained. This conclusion is completely in accord with *Bouch* v. *Sproule* (1), which at last, after reviewing a great mass of conflicting cases, established the rational principle that what a tenant for life is to take under an ordinary bequest of shares is what is declared as dividends or bonuses in the shape of dividends during the lifetime of that tenant for life. The exact point which we have to decide is not quite covered by *Bouch* v. *Sproule*, and there are passages in the judgment of

(1) 12 App. Cas. 385.

Lord *Bramwell* which have been relied upon by Mr. *Byrne* as shewing that everything is divisible as income until it is capitalized. For the purposes of that case that language is perfectly accurate, but it is not quite exhaustive. It is true that this property has never been capitalized by the company, neither has it ever been declared as a dividend or a bonus by the company; the company has not dealt with it in either one shape or another. But when you come to ask yourself whether it is to go to the tenant for life or to the remainderman, there can be but one answer—it is to go to the remainderman. I think the appeal must be allowed.

LOPES, L.J.:—

When you have replaced the capital I think it is perfectly clear that the balance which remains over and above is profit. Therefore I come to the conclusion that this £1 5*s.* 6½*d.*, the excess of the sum paid for each share over the £8 which was paid up upon it, is profit. But the question that we have to determine is this, whether that excess is to go as income to the tenant for life or is to be regarded as capital enuring for the benefit, not of the tenant for life only, but also for the benefit of those interested in the capital. Now the company is voluntarily winding up, and previously to the winding up there had been no dividends declared in respect of this excess, nor had the funds which produced this excess been in any way capitalized; but I come to the conclusion beyond any doubt that this excess is to be regarded as capital and not as income and is not to go to the tenant for life. There is an argument in support of this view to which no answer has been given. It is admitted that if these shares had been sold by the executors for £9 5*s.* 6½*d.* per share before this sale *en masse* of all the shares to the new company, the excess of £1 5*s.* 6½*d.* per share would have been regarded as capital and would not have gone to the tenant for life. How does the fact that there has been a sale to this new company, instead of an ordinary sale in the market by the executors, convert that which would otherwise be regarded as capital into income? I am unable to answer that question when I put it to myself, and the learned counsel for the Respondents have not answered it in any

C. A.
1893
In re ARMITAGE
ARMITAGE v. GARNETT

way satisfactory to my mind. I think, therefore, that this appeal should be allowed.

A. L. SMITH, L.J.:—

I am of the same opinion. I adopt the judgment of Lord Justice *Lindley*, who has expressed everything, and if I were to deliver another judgment I should probably only water down something which has been said.

Solicitors: *Grundy, Kershaw & Co.; Busk & Co.*, agents for *Sale, Seddon & Co., Manchester.*

H. C. J.

C. A.
1893
KEKEWICH, J.
April 26.
C. A.
July 25, 28, 31: *Aug.* 8.

In re BAGOT.
PATON *v.* ORMEROD.

[1892 B. 5431.]

Will — Construction — Residuary Gift — Excepted Property — Intention to exclude—Erroneous Recital.

Where the will of a testator contains a general residuary gift, then, in order to exclude from that gift a particular property belonging to the testator, and not otherwise disposed of by the will, it is necessary to find a plain and unequivocal intention on the part of the testator not to include that property in the residuary gift, even if it is his to dispose of.

A testatrix, by mistake, recited in her will that she had settled upon *A. B.* a particular property, which, in fact, was still at her disposition. The will contained other recitals and bequests of other properties, and also a residuary bequest in favour of *X.*:—

Held, by the Court of Appeal (affirming the decision of *Kekewich*, J.) that the property mentioned in the recital passed under the residuary gift to *X.*

Circuitt v. *Perry* (1), *Harris* v. *Harris* (2), *Hawks* v. *Longridge* (3), and *Clubborn* v. *Clubborn* (4) observed upon.

APPEAL from a decision of Mr. Justice *Kekewich* upon an originating summons, taken out under Order LV., rules 3 and 4, and adjourned into Court.

Matilda Bagot, of *Rusper Nunnery*, near *Horsham*, widow, by

(1) 23 Beav. 275.
(2) Ir. R. 3 Eq. 610.
(3) 29 L. T. (N.S.) 449.
(4) 9 Ir. Jur. 381.

her will, dated the 5th of March, 1881, recited (1.) that under the will of her father his trustees were directed to stand possessed of one-third part of certain trust moneys in trust for her children, or remoter issue (born in her lifetime), as she should by deed or will appoint; (2.) that she had appointed the greater part of the said one-third part in favour of her two daughters, *Evelyn Bernal* and *Ethel Jane Paton*, and that the only part of the said one-third part then remaining consisted of a sum of £713 10*s.* 10*d.* Consols. The testatrix then, in exercise of her power under her father's will, appointed the said sum of £713 10*s.* 10*d.* Consols, and all other the unappointed trust moneys over which she had any power of appointment under her father's will, upon trust for her sons, *Ponsonby Bagot* and *Villiers Spencer Bagot*, in equal shares. The testatrix next recited: (3.) "And whereas, by virtue of the will of my late brother . . . I am entitled for my separate use to one-third part of the sum of £100,000 therein mentioned, and also to one-third part of certain Reduced Annuities and New Three per Cent. Annuities, or the investments thereof, subject to certain charges and directions in the same will contained. (4.) And whereas I have settled the sum of £16,000, part of the said moneys to which I am so entitled by virtue of my late brother's will, in favour of my son, *Ponsonby Bagot*, and I have also settled one undivided moiety of the residue of the said one-third part of £100,000, to which I am so entitled under the will of my said brother in favour of my said daughter, *Ethel Jane Paton*, and her family: Now, I hereby give and bequeath the other undivided moiety of the residue of the said one-third part of the said sum of £100,000 unto *Charles Edward Ormerod*, now residing at *The Nunnery, Horsham*, Esq., absolutely for his own use and benefit." The testatrix then gave to the said *Charles Edward Ormerod* the one-third part of the Reduced and New Three per Cent. Annuities, or the investments thereof, to which she was entitled as aforesaid; and after reciting that she was entitled to the right of pre-emption over certain heirlooms, and had purchased the same, she directed her executors to pay the purchase-money out of her residuary estate. Then, after giving a specific legacy to a granddaughter, the testatrix bequeathed "all the residue of my estate and effects,

C. A
1893
In re BAGOT.
PATON
v.
ORMEROD.

of what nature or kind soever and wheresoever, which shall remain after payment of my funeral and testamentary expenses and debts, to the said *Charles Edward Ormerod* for his own use and benefit," and appointed him and *Frederick Peake* her executors.

The testatrix died on the 4th of July, 1889, and her will was proved by *Charles Edward Ormerod* alone.

The first part of the 4th recital in her will—viz., that she had settled £16,000, part of the moneys to which she was entitled under her brother's will, in favour of her son, *Ponsonby Bagot*—was in accordance with the facts. But the second part of that recital—viz., that she had settled a moiety of the residue of the sum of £100,000, to which she was entitled under her brother's will, in favour of her daughter, *Ethel Jane Paton*, and her family—was erroneous; for, as a matter of fact, the only settlement she had made upon them was by a will which, in an action brought in the Probate Division, was held to have been revoked by the will now under consideration.

Ethel Jane Paton died in the lifetime of the testatrix on the 11th of October, 1885, leaving her husband, *George Paton*, and certain infant children her surviving; and this was a summons taken out on behalf of two of such children, in order to have it determined what person or persons were entitled to the moiety of the residue of the £100,000 referred to in the erroneous recital, and in and for what shares and interests. To this summons *Charles Edward Ormerod*, *George Paton*, and the persons who claimed to be the next of kin of the testatrix, were made Defendants; and the summons, having been adjourned into Court, came on for hearing before Mr. Justice *Kekewich* on the 26th of April, 1893.

Warmington, Q.C., and *Bramley*, for the Plaintiffs, contended that the erroneous recital operated as a gift of the moiety in question, in favour of *Ethel Jane Paton* and her family by implication: *Hall* v. *Lietch* (1); *Poulson* v. *Wellington* (2).

Renshaw, Q.C., *Sebastian*, and *Warrington*, for the next of kin of the testatrix, contended that the moiety was altogether undis-

(1) Law Rep. 9 Eq. 376. (2) 2 P. Wms. 533.

posed of by the will, and cited *Scale* v. *Rawlins* (1); *Circuitt* v. *Perry* (2); *Hawks* v. *Longridge* (3); *Bernard* v. *Minshull* (4); *Harris* v. *Harris* (5); *Clibborn* v. *Clibborn* (6); *Westcott* v. *Culliford* (7); *Attorney-General* v. *Johnstone* (8); *Wainman* v. *Field* (9); *Jarman* on Wills (10).

Ingle Joyce, and *R. J. Parker*, for the Defendant, *Charles Edward Ormerod*, contended that the moiety fell into the residuary gift: *Leake* v. *Robinson* (11); *Cambridge* v. *Rous* (12); *Blight* v. *Hartnoll* (13); *Markham* v. *Ivatt* (14).

Kekewich, J.:—

It was impossible that there should not be a question under this will. It was impossible, with a statement such as here occurs and which turns out to be erroneous, that there should not be room for argument respecting the intention of the testatrix when considered in a Court of Law. But, to my mind, when one considers all the language of the will and the authorities which are the guide to the construction of an instrument like this, I think the argument in favour of an intestacy cannot succeed except upon an erroneous view of the residuary clause, and upon an application beyond their proper limits of the cases on which the argument in favour of intestacy is based.

One must bear this in mind, that there is a great difference between the view from which one approaches any specific gift and the view from which one approaches a residuary gift for the purposes of construction. In order to ascertain what is given, or whether any particular thing is well given, by a specific gift, you must look to see whether that particular item is included. The question is, whether it is included or not; but once given a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded; and

(1) [1892] A. C. 342.
(2) 23 Beav. 275.
(3) 29 L. T. (N.S.) 449.
(4) Joh. 276.
(5) Ir. R. 3 Eq. 610.
(6) 9 Ir. Jur. 381.
(7) 3 Hare, 265, 272.
(8) Amb. 577.
(9) Kay, 507.
(10) 5th Ed. vol. i. pp. 491, *et seq.*
(11) 2 Mer. 363, 392.
(12) 8 Ves. 12.
(13) 23 Ch. D. 218.
(14) 20 Beav. 579.

C. A.
1893
In re BAGOT.
PATON v. ORMEROD.
Kekewich, J.

you must find words sufficiently large, sufficiently definite, sufficiently distinct, to enable you to say that some item is excluded so that, to use the language of one of the authorities, what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. Of course a testator may enumerate his estate in such terms that there can be left no doubt but that he means that enumerated estate, and that only, to pass, and then the residuary gift, however large in its terms, may be construed to include only such portions of the enumerated estate as are not specifically given. Of course, that may be done by implication from language from which his intention may be inferred, as well as expressly; but directly you come to inference as against a residuary gift the inference must be irresistible.

In this case there is no doubt whatever about the language of the residuary gift. It is as large a residuary gift as could be. The gift is "all the residue of my estate and effects, of what nature or kind soever and wheresoever, which shall remain after payment of my funeral and testamentary expenses and debts." Nothing could be larger. Does it or does it not include that which the testatrix has recited to have been settled—that is to say, one moiety of the residue of one-third of a certain sum of £100,000? There is a statement that it was settled; it turns out that the statement is erroneous. This moiety was really part of the testatrix's estate and effects, and might have been disposed of by her if she had been so minded. She might have disposed of it specifically; she has not done so, and therefore it falls into the residue, unless the language used is sufficient to exclude it. Now, there is nothing here to shew any intention of the testatrix except the bare recital; there is not any word indicating a process of reasoning; there is no use of such a word as "therefore," or anything of the kind; there is no division into different families or *stirpes*, with an indication that each particular *stirps* is to have a particular share of her property. There is nothing more than this bare recital, which was erroneous. That is the only indication, if indication it be, of an intention that the moiety shall not form part of the residue. If she had settled it, but settled it in such a way that the gift failed; if she

had settled it in a manner offending against the law of perpetuities; if she had given it upon charitable trusts which could not be performed; if in any other way she had settled it, but not effectually; if there had been left outside some remainder, some part of the whole not effectually settled, it may be said that the same impression would arise; but it could hardly be said that what had not been effectually settled, what had not been thoroughly disposed of, would not fall into the residue. I see no difference really between a recital such as this and a recital that she had given the moiety to a purpose to which the law did not allow it to be given. The recital is at the beginning of this portion of the will, and the residuary gift is at the end, and there is nothing to connect the two.

Then am I obliged by the authorities to come to a conclusion different from that to which my own construction of the language takes me? I think not. There are several cases deserving of close attention, which would certainly have to be followed if this case fairly came within the ambit of those authorities. The leading case, because it is always the one that is referred to in the subsequent cases, and on which the Judges in those cases dwell, is *Circuitt* v. *Perry* (1). I will take my account of *Circuitt* v. *Perry* from the decision of the Vice-Chancellor of *Ireland* in the case of *Harris* v. *Harris* (2). He says (3): "The case of *Circuitt* v. *Perry*, goes fully to the same extent, for the testator recited erroneously that his nephews and nieces were entitled under the will of their grandfather, and stated that as the reason why he did not give them more than he did; and he gave the residue to the plaintiff." I read that passage because it is a little difficult to extract the precise meaning of the Master of the Rolls for the conclusion at which he arrives from the language he used. His language, of course, as that of all other Judges, refers to the materials before him, including the will, which is not set out in his judgment. But the Vice-Chancellor of *Ireland* seems to have done the task so well that I borrow his language instead of attempting it myself. Now, in the present case, there is the absence of the reason which was present in *Circuitt* v. *Perry*.

(1) 23 Beav. 275. (2) Ir. R. 3 Eq. 610.
(3) Ir. R. 3 Eq. 620.

C. A.
1893
In re BAGOT.
PATON v. ORMEROD
Kekewich, J.

The case of *Harris* v. *Harris* (1) goes precisely to the same end. In that case there were peculiar words shewing what the testator's intention was. He observed, he said, that by his marriage settlement certain lands were settled on his eldest son: "I therefore consider these (as above) ample provision for him; and I do therefore bar him from any further participation in my property." Nothing could have shewn a clearer intention than the language there employed; and to have given the son under the residuary clause that which the testator had expressly said was not to pass by the residuary clause would really have been to defeat the intention expressed on the face of the will.

The case before Vice-Chancellor *Malins* of *Hawks* v. *Longridge* (2) I think may be passed over with the remark that it was founded on *Circuitt* v. *Perry* (3), and did not profess to go beyond it.

But there is another case, which is also an Irish one, which must be noticed—that is, *Clibborn* v. *Clibborn* (4). That case requires to be looked into because it is not at all clear at first what its application to the present case is. There, strangely enough, there was no devise at all: a fact which is noticed by the Lord Chancellor of *Ireland* in his judgment; and that alone might be a good distinction from such authorities as I am now considering. There was no devise, but the testator desired that his property and children should be placed under the Court of Chancery if his trustees were unwilling to act, and the question arose of what his property, which was to be so placed under the Court of Chancery, consisted. One of the reasons apparently—or the reason—why he made this request or suggestion of a Chancery suit was that the trouble of the trustees would be increased by the fact that certain property called *Anner Mills* was settled on his son. The expression is, "*Anner Mills* being settled on my son, they will have more care than I could wish." The testator desired his trustees to act, but gave them the power of resorting to the Court of Chancery; and the Lord Chancellor came to the conclusion, and apparently a conclusion which followed from the use of the language, that if it had not been for *Anner Mills* being settled on the testator's

(1) Ir. R. 3 Eq. 610.
(2) 29 L. T. (N.S.) 449.
(3) 23 Beav. 275.
(4) 9 Ir. Jur. 381.

son he would not have thought that his property would give the executors much care, and he would not have thought it right to resort to the Court of Chancery. Therefore they were to resort to the Court of Chancery because the property which was to be placed under the care of the Court would include *Anner Mills*. It appeared that *Anner Mills* had not been settled on his son, so that the recital was erroneous; and the conclusion, therefore, was that the property which was to be placed under the care of the Court did not include *Anner Mills*. It is a peculiar case; but there again you have the reason expressed for, not the devise, but the directions given in the will; and if the reason had been absent it is impossible to speculate what the testator would have done. The reason controlled the direction.

I find, therefore, through all these cases a reason given to control the testator's intention, the testator giving that reason as the inducing cause of what he does. Here I find nothing of the kind, and I think I should be interfering with settled principles of law, as regards the construction of residuary gifts, if I were to hold that this residuary gift did not pass that which the testatrix thought was not part of her property, but which was in fact part of her property, and which she could dispose of by residuary gift. I hold, therefore, that the moiety falls into the residue.

G. I. F. C.

C. A.

The Plaintiffs and the Defendants, other than *Charles Edward Ormerod*, appealed against the second part of this decision. The appeal came on for hearing on the 25th of July, 1893.

Warmington, Q.C., *Renshaw*, Q.C., and *Bramley*, for the Appellants:—

The recital in question shews the intention of the testatrix that the property which she therein mentioned should not form part of her residuary estate, and accordingly it ought to be excluded from the residuary bequest. In *Circuitt* v. *Perry* (1) an untrue recital that a certain property which in fact belonged to the testator belonged to somebody else was held to shew an intention not to dispose of it, so that it went as on an intestacy,

(1) 23 Beav. 275.

C. A.
1893
In re BAGOT.
PATON v. ORMEROD.

and did not pass under a general disposition. This was followed in *Harris* v. *Harris* (1) and in *Hawks* v. *Longridge* (2). A similar principle was applied in *Davers* v. *Dewes* (3), where a testator stated his intention to dispose of his household goods by codicil, and bequeathed the residue of his personal estate, not disposed of nor reserved to be disposed of, by codicil. He made no codicil, and the goods were held to be undisposed of. The Court cannot speculate as to what the testator would have done if he had known the truth, and so spell out a gift which he has not made: *Westcott* v. *Culliford* (4).

[They also referred to *Bernard* v. *Minshull* (5) and *Clibborn* v. *Clibborn* (6).]

Sir *H. Davey*, Q.C., *Ingle Joyce*, and *R. J. Parker*, for the Respondent:—

The question whether or not a particular property passes under a residuary gift does not depend upon the intention of the testator that the gift should include that item. The law includes in a gift of residue everything belonging to the testator which is not otherwise disposed of by the will. *Blight* v. *Hartnoll* (7) shews the true nature of a residuary gift. There was no intention on the part of the testatrix to die intestate as to this property. What she contemplated was that she had disposed of it in her lifetime. The recital was merely for the purpose of explaining what the subject of the specific gift was; and the inference is rather that if she had supposed she had not already disposed of this particular item she would have enlarged the specific gift to Mr. *Ormerod*. The next of kin are not mentioned in the will. This is the case of a full and simple residuary gift, without any connection between that clause and the recital. It is not like *Circuitt* v. *Perry* (8), where there was a distinct connection of cause and effect between the recital and the clause, as was shewn by the expression, "I therefore give." Moreover, if *Circuitt* v. *Perry* and *Hawks* v. *Longridge* could now come

(1) Ir. R. 3 Eq 610.
(2) 29 L. T. (N S) 449.
(3) 3 P. Wms. 40.
(4) 3 Hare, 265, 272.
(5) Joh. 276.
(6) 9 Ir. Jur. 381.
(7) 23 Ch. D. 218.
(8) 23 Beav. 275.

before the Court of Appeal, they would not be decided in the same way. In *Clibborn* v. *Clibborn* (1) there was in reality no residuary gift; and *Bernard* v. *Minshull* (2) and *Harris* v. *Harris* (3) are really authorities in our favour. Here it would defeat the general intention expressed in the residuary clause if the Court were to hold that the testatrix intended to die intestate as to this property, or to exclude it from the residuary clause: *Falle* v. *Godfray* (4); *Harris* v. *Harris*; *Markham* v. *Ivatt* (5); *Doe* v. *Thomas* (6); *Jarman* on Wills (7)

Warmington, in reply, cited *Easum* v. *Appleford* (8) and *Cambridge* v. *Rous* (9).

1893. Aug. 8. LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, declaring that a fund which a testatrix supposed not to be hers, but which in fact was her property, passed under the bequest of her residuary estate. [His Lordship then stated the will and the facts of the case, and continued:—]

Now, the residuary bequest is expressed in terms wide enough to include whatever personal estate not otherwise disposed of by her will the testatrix might have at her death, whether she knew that she had it or not. She intended whatever was hers, and was not otherwise disposed of, to go to her residuary legatee. It is true that she did not intend this particular fund to go at once to him, because she thought she had settled it already, and that, therefore, it was not hers. She made a mistake; it was hers, and the residuary bequest in terms carries it. The effect of a residuary bequest is so fully explained in *Easum* v. *Appleford* and *Blight* v. *Hartnoll* (10) as to render it quite unnecessary to examine the authorities on the point. The short effect of them is what I have stated.

To exclude a particular portion of the personal estate of a

(1) 9 Ir. Jur. 381.
(2) Joh. 276.
(3) Ir. R. 3 Eq. 610.
(4) 14 App. Cas. 70.
(5) 20 Beav. 579.
(6) 1 Man. & G. 335.
(7) 5th Ed. vol. i. p. 612.
(8) 5 My. & Cr. 56, 61.
(9) 8 Ves. 12.
(10) 23 Ch. D. 218.

C. A.
1893
In re Bagot Paton v. Ormerod
Lindley, L.J.

testator, not otherwise disposed of by his will, from a bequest of his residuary personal estate, it is necessary to find an intention not to include that portion even if it is his. If such an intention can be found effect must of course be given to it, and an intestacy will then necessarily be the consequence. In this case there is absolutely no indication of any intention to exclude this fund from the operation of the residuary bequest if the fund was the testatrix's property, which in fact it was.

Suppose that the fund which the testatrix thought she had settled had been settled, but that by failure of the trusts of the settlement that fund had again become hers: it would then clearly have passed under the residuary bequest. This result, moreover, would have been in accordance with her intention as expressed in the residuary bequest. But this shews that if this fund was hers she did not intend to exclude it from the operation of the bequest of her residuary estate.

But then it is said that to construe the will so as to include this fund in the residuary bequest will be contrary to several decisions, viz., *Circuitt* v. *Perry* (1); *Harris* v. *Harris* (2); *Hawks* v. *Longridge* (3); and *Clibborn* v. *Clibborn* (4). Certainly in each of these cases the Courts held that a fund as to which a testator had made a mistake did not fall into the residue of his estate. But I cannot extract from those cases any principle of law which compels me to hold that there has been an intestacy in this case. In *Circuitt* v. *Perry* Lord *Romilly* seems to have intimated that a residuary bequest would not include property which a testator thought was not his. But this is a proposition which cannot be supported. In *Harris* v. *Harris* the principle was much more correctly expressed in the following language of the Vice-Chancellor of *Ireland* (5): "In considering this question the real point to be considered is, that a residuary devisee is not to be excluded except by express words used by the testator in the will, shewing an intentional exclusion of the property in question from the operation of the residuary clause. If the words fall short of that, the property passes under the residuary

(1) 23 Beav. 275.
(2) Ir. R. 3 Eq. 610.
(3) 29 L. T. (N.S.) 449.
(4) 9 Ir. Jur. 381.
(5) Ir. R. 3 Eq. 618.

devise, and no residuary devise could be more extensive than this." Even this language, however, does not go quite far enough; the intention to exclude must not be founded on a mistake as to the ownership of the property: it must be an intention to exclude the property even if it is the testator's to dispose of.

Notwithstanding *Circuitt* v. *Perry* (1) and the other cases referred to, in which, in my opinion, sufficient effect was not given to a residuary clause, and which, therefore, I decline to follow, I am of opinion that the decision appealed from is correct, and that the appeal must be dismissed with costs.

LOPES, L.J.:—

I have had the opportunity of reading the judgment of Lord Justice *Lindley*, with which I agree; but as our decision interferes with certain old authorities, I desire to add a few words.

Mr. Justice *Kekewich* decided that a trust fund which the testatrix believed not to be hers, but which in fact was hers to dispose of, passed under the residuary gift in her will.

The residuary gift is large and comprehensive enough to pass any property which the testatrix possessed which had not been otherwise disposed of.

Bernard v. *Minshull* (2) well defines what passes under a general residuary gift. It passes everything not disposed of whether the testator has not attempted to dispose of it, or whether the disposition fails by lapse, or any other event.

But it is said the testator may in his will shew an intention not to include certain property in the residue by reciting, for instance, that it is settled in a particular manner though it is not so settled, and *Circuitt* v. *Perry*, *Harris* v. *Harris* (3), and *Hawks* v. *Longridge* (4) were relied upon.

This intention, in my judgment, must be plain and unequivocal, and must amount to an intention not to include the property in question in the residuary gift, even if it is the testator's to dispose of. If that intention can be found, effect

(1) 23 Beav. 275.
(2) Joh. 276.
(3) Ir. R. 3 Eq. 610.
(4) 29 L. T. (N.S.) 449.

C. A.
1893
In re BAGOT.
PATON v. ORMEROD.
Lopes, L.J.

must be given to it, and the testator must be considered to have died intestate as to that particular property.

I can find in this will no such intention to exclude the property in question from the gift of the residue, whether it was the testatrix's to dispose of or not. The testatrix made a mistake; she thought the property was not hers when it was hers. I can find no intention not to include it in the gift of the residue, if it was hers to give.

If this decision is in conflict with the cases I have above cited I think they are wrong. It may be that the Courts deciding those cases found an intention in the wills they were adjudicating upon which I am unable to find in this will.

Suppose the testator recited in his will that he had some months before making his will granted a certain property to a purchaser which it was discovered after his death had not been so granted, but over which he had an absolute power of disposition, could it in such a case be doubted but that the property in question would pass under a general residuary gift in his will? I distinctly say it could not; but that case is the same in principle as the present.

I think this appeal must be dismissed with costs.

A. L. SMITH, L.J.:—

The point which arises in this case is whether one undivided moiety of the residue of one-third part of £100,000 to which the testatrix *Matilda Bagot* became entitled under the will of her brother is excepted by her from the operation of her will so as not to pass, as it otherwise would, to her residuary legatee, Mr. *Ormerod*, and consequently, being undisposed of, goes to her next of kin.

It is admitted that the recital in her will that she had settled the one-third upon her daughter *Ethel Jane Paton* is not correct, and that *Ethel* takes no part of the one-third under any settlement, as was evidently supposed to be the case by the testatrix when she made her will; the truth being that the testatrix had bequeathed this one-third to *Ethel* by a prior will, which she specifically revoked by the will now in question.

It is also admitted that there is a true residuary bequest in the

will; the words are: "And I bequeath all the residue of my estate of what nature or kind soever to . . . . *Charles Edward Ormerod.*"

In such circumstances, what is the rule of law or principle to be applied? This is to be extracted from the decided cases.

It appears to me far more important to ascertain this, if possible, than to discuss what other testators may have said in other wills, and the construction Judges may have placed upon the particular language of such wills taken before them, if such Judges lay down no principles.

I have read the cases cited, and I extract the rule of law or principle from them to be as follows: To prevent personal property which would otherwise fall into the general residue, assuming a true general residuary bequest to exist, there must be found in the will an expression of the testator's intention not only to except such property either from the operation of the will or from the operation of the residuary clause in the will in favour of a particular recipient, but an intention to except it from the operation of the will, or the residuary clause, as the case may be, whether the proposed recipient in the events which happen can take the property or not.

There must be found in the will the intention that, whether the proposed recipient can take the property or not, it shall never fall into the general residue.

I will cite two cases where the principle appears to me to be clearly enunciated. First, the case of *Bernard* v. *Minshull*, in 1859 (1), by *Page Wood*, V.C. He says: "All you have to consider is, whether the property is excepted in order to take it away, under all circumstances and for all purposes, from the persons to whom the rest of the property is given; or whether it is excepted merely for the purpose of giving it to somebody else. If the latter, and the gift to somebody else fails, the donees of all except this property are entitled to take the whole."

Secondly, in *Blight* v. *Hartnoll* (2), where Mr. Justice *Fry* states the rule in this way (3): "I take the rule to be plain that in general the residuary gift carries away lapsed legacy and every

(1) Joh. 276, 299. (2) 23 Ch. D. 218.
(3) 23 Ch. D. 220.

C. A.
1893
In re BAGOT.
P'ATON v. ORMEROD.
A. L. Smith, L.J.

legacy which on any ground fails to take effect, but that is subject to this other rule, that if the testator has shewn some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention." This judgment was affirmed on appeal. Now apply this rule to the will here in question. Where is there any expression of intention that the one-third of the residue of the £100,000 should never fall into the general residue, if, for some reason or other, the supposed settlement upon *Ethel* become inoperative? Suppose the settlement were held good as to part of the one-third and invalid as to the rest—where, I ask, would the rest go to? Can it be doubted that it would fall into the residue? I agree that there is an expression of intention that the one-third was not to fall into the general residue, because it was supposed that the settlement upon *Ethel* was a valid existing settlement; but where is there any expression of intention that it should not fall into the residue if the settlement turned out to be non-existent?

I can find none, and this is the blot in the Appellants' case. There is no expression of an intention to take the one-third out of the operation of the will, to use *Wood*, V.C.'s, words, "under all circumstances and for all purposes."

A general residuary gift of personalty in a will sweeps up, and is intended to sweep up, all personal property of which the testator may die possessed which from any cause may happen not to be otherwise effectually disposed of; and, in my judgment, all such property falls into the general residue, unless an intention is apparent in the will that it is not under any circumstances to do so.

As regards the cases of *Circuitt* v. *Perry* (1), *Harris* v. *Harris* (2), *Hawks* v. *Longridge* (3), and *Clibborn* v. *Clibborn* (4), I have not to decide whether upon the language therein used those cases were rightly or wrongly decided.

They were decisions upon totally different wills and recording the judgments of Judges upon those wills.

There is nothing in any of them which lays down a rule incon-

(1) 23 Beav. 275.
(2) Ir. R. 3 Eq. 610.
(3) 29 L. T. (N.S.) 449.
(4) 9 Ir. Jur. 381.

sistent with what I have above stated; and, applying that rule to the will in hand, I can come to no other conclusion than that the one-third falls into the general residue, that the judgment of Mr. Justice *Kekewich* is correct, and that this appeal must be dismissed.

Solicitors: *Dunster & Chapman; Peake, Bird, Collins, & Peake.*

W. W. K.

In re AKEROYD'S SETTLEMENT. ROBERTS *v.* AKEROYD.

C. A.
1893
Aug. 8.

[1893 A. 690.]

Settlement—Forfeiture Clause—Trust for Husband till Bankruptcy or Death—Limitation over on Death of Husband—Implication—Interim Income.

By a marriage settlement certain funds belonging to the wife were settled upon trust to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or alienate the same or until his death, whichever should first happen; and after the decease of the survivor of the wife and husband, then upon trust for the children of the marriage. The husband became a liquidating debtor, and then the wife died, leaving her husband surviving.

Held, that the limitation over had taken effect, and that the income of the trust fund between the death of the wife and the death of the husband belonged to the children.

In re Trechwell (1) distinguished.

BY the settlement made on the marriage of Mr. *J. B. Akeroyd* with *Mary Smith* his wife, dated the 12th of February, 1873, the contingent interest of the intended wife in two funds was assigned to trustees upon trust to invest the same funds when received, and to pay the annual income to the wife during her life for her separate use, and after her death to her husband until he should become bankrupt or should assign, charge, or otherwise dispose of the same or attempt to do so, or until he should do some act, or some other event should occur, whereby the said income, if payable to himself, would have vested in some other person or persons, or until his death, which should

(1) [1891] 2 Ch. 640.

C. A.
1893
In re AKEROYD'S SETTLEMENT.
ROBERTS v AKEROYD

first happen; and after the decease of the survivor of the said *Mary Smith Akeroyd* and *J. B. Akeroyd* then as to as well the capital of the said trust premises as the annual income thereof in trust for the children and remoter issue of the said marriage as therein mentioned. The settlement contained a power for the trustees, with the consent in writing of the husband and wife during their joint lives and of the survivor during his or her life, and after the decease of the survivor at the discretion of the trustees, to raise any part not exceeding one-half the expectant share of any child for his or her advancement or benefit. The power of appointing new trustees was vested in the husband and wife during their joint lives, and in the survivor during his or her life.

One of the settled funds was given to *Mary Smith Akeroyd* by the will of *William Smith Dickinson* for her separate use, and the other was given to her by the will of *James Dickinson* absolutely.

On the 26th of February, 1883, a resolution was passed by the creditors of *J. B. Akeroyd* for the liquidation of his affairs by arrangement.

After her husband's liquidation, and after he had obtained his discharge, Mrs. *Akeroyd* died.

On the 27th of May, 1893, an originating summons was taken out for the purpose of obtaining the decision of the Court on the question who was entitled to the interest of the settled funds between the death of Mrs. *Akeroyd* and the death of *J. B. Akeroyd*, having regard to the forfeiture of his interest by his liquidation.

Mr. Justice *North* made the following order: That the terminable life interest of the Defendant, *J. B. Akeroyd*, under the marriage settlement to which he was entitled in reversion contingently on surviving *Mary Smith Akeroyd* was forfeited by reason of the resolution of the 26th of February, 1883, for the liquidation of his affairs by arrangement; and that the interest of the issue of the Defendant, *J. B. Akeroyd*, did not take effect in possession until the death of the survivor of them, the said *J. B. Akeroyd* and *Mary Smith Akeroyd*, and that the income of the said trust funds from the death of the said *Mary Smith Akeroyd* and during the remainder of the life of the said *J. B. Akeroyd* was

not disposed of by the said settlement. And he declared that the income of the fund derived under the will of *William Smith Dickinson* belonged to the administrator of the estate of Mrs. *Akeroyd*, and the income of the fund derived under the will of *James Dickinson* belonged to the trustee in the liquidation of *J. B. Akeroyd*.

From this order the infant children of *J. B. Akeroyd* appealed.

Sir *H. Davey*, Q.C., and *Hood*, for the Appellants:—

Mr. Justice *North* decided the case on the authority of *In re Tredwell* (1), where a testator gave the income of a fund to his widow during her life or widowhood, and after her death he directed that certain legacies should be paid out of the fund. The Court there held that the legacies were not to be paid till the widow died, although she had married again. But that decision turned on the apparent intention of the testator, and has no application to a case like the present, where the evident intention was that the whole interest should be settled, and that the limitation over should take effect on the termination of the prior interests, whenever that might be. In such a case, the Court will act on a necessary implication in order to carry out the intention of the parties. It is absurd to suppose that the parties meant to leave a gap in the trusts: *Underhill* v. *Roden* (2); *Jones* v. *Westcomb* (3); *Stanford* v. *Stanford* (4).

Levett, Q.C., and *Gatey*, for the trustee in the liquidation:—

The doctrine of implication only applies where there is an ambiguity in the words. Here there is no ambiguity; the words are quite clear: *In re Tredwell* governs the case. The difficulty may have arisen from a mere slip, but even if the Court might supply words to correct the gift over in a will, it cannot do so in a settlement.

G. P. C. Lawrence, for *J. B. Akeroyd*.

Beaumont, for the trustees of the settlement.

Sir *H. Davey*, in reply.

(1) [1891] 2 Ch. 640.
(2) 2 Ch. D. 494.
(3) 1 Eq. C. Ab. 245.
(4) 34 Ch. D. 362.

C. A.
1893
In re AKEROYD'S SETTLEMENT.
ROBERTS v AKEROYD.

LINDLEY, L.J.:—

This case is a little curious by reason of the complication of the title; but as regards the construction of this instrument, I confess I do not feel any difficulty. Here is a marriage settlement, and the lady is entitled as appears by recitals to some contingent interest under the will of Mr. *James Dickinson*, and also to a contingent interest under the will of Mr. *William Smith Dickinson*. The settlement contains a recital that upon the marriage it was agreed that the contingent interest of the lady in both those properties should be settled. The property is vested in trustees, upon trust to pay the income of the trust property, as I will call it for shortness, to the lady for her life, for her sole and separate use, free from the control of her husband, and without power while under coverture to dispose thereof by way of anticipation, and after her death to the husband "until he shall become bankrupt." Now pausing there, I apprehend that means exactly what it says, until he shall become bankrupt. That is at any time. According to the cases it means not only "shall be bankrupt" after her death, but even before she dies. That is covered by authority. Then the settlement proceeds, "or shall otherwise dispose of the same or attempt to do so, or until he shall do some other act or some other event shall occur whereby the same income if payable to himself would become vested in some other person or persons or until his death which shall first happen." That is intelligible enough. Then there is a trust in remainder which does not fit all the events upon which his interest is to cease. The gift over is confined to his death, and after the decease of the survivor of the husband and wife—nothing being said about bankruptcy, or assignment, or anything else—then to the children. Then there are clauses of advancement by the trustee with the consent of the husband. I confess that, without knowing anything at all about the events which have happened, about the date of his liquidation, the circumstances of his discharge, and when these interests fell into possession, but looking only at the recitals and at the operative part of the deed, it does appear to me to be as plain as can be, that the real intention of the parties was that this property was to go to the children upon the determination of the life interest of their parents. I cannot

doubt that for a moment. I do not call that guessing. The intention is plain; but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention, because in the gift over he has confined it to one of the events instead of putting in some general words which would cover the whole; but that particular kind of flaw does not require a suit to rectify the instrument. The mistake can be corrected by construction provided the intention is clear and plain from the document itself. In *In re Tredwell* (1) we could not ascertain the intention. Here we can. I have not the slightest doubt as to the construction of this document. The whole goes over to the children when they become of age. I cannot help thinking that Mr. Justice *North* has attached too much importance to the decision in *In re Tredwell*, and overlooked for the moment the fact that we took great care to decide that case upon the ground that we could not see the intention which it was there contended was to be gathered from the document. Here we can, and I am clearly of opinion that the true construction of this document is in favour of the Appellants.

LOPES, L.J.:—

I am of the same opinion. The settlor in this deed, to my mind, has no doubt expressed himself imperfectly; but I think having regard to the clear illustration of what his intention was in the earlier part of this clause, what he meant was, in my opinion, to make a gift over on the determination by death or by bankruptcy. I cannot help thinking that this is the clear intention which is to be found upon this particular clause. I test it in this way, as it was tested by Sir *Horace Davey*. Supposing a bankruptcy had occurred after the death of the lady, supposing the husband survived his wife. If Mr. *Levett's* contention is right, all the property would then have gone to the trustees. Now, it seems to me that this cannot be said to have been the intention of the settlor. To my mind it was the very thing that the clause was inserted to prevent. Mr. Justice *North* has attached too much importance to the case of *In re Tredwell*. This case is distinguishable from that. Therefore I think this appeal should be allowed.

(1) [1891] 2 Ch. 640.

C. A.
1893
In re AKEROYD'S SETTLEMENT.
ROBERTS v. AKEROYD

A. L. SMITH, L.J.:—

I think so too. I own that Mr. *Levett* for some time shook me when he put the point as he did very forcibly under this settlement; but when I come back to read it I find he is wrong. Now, what is this clause? I will just read it shortly, leaving out all the surplusage. It is in trust to pay the income of the property to the wife for life, and after her death to her husband until he becomes bankrupt, or until he dies. Then what next? After the death of the wife, after the death or bankruptcy of the husband, then it is to go over to the children. It seems to me perfectly plain upon this deed that was the intention of the parties. It is quite true the draftsman has said that after the decease of the survivor of the wife and husband the property is to go over, and the word "bankruptcy" is not there. What is the rule to be applied? I understand the rule is accurately stated by Lord Justice *Lindley* in *In re Tredwell* (1), in which he says it is necessary "to see something in the will which convinces the mind that the testator must have meant that these legacies," the equivalent to the gift over in this case, "should be paid at some time or other different from what he has said." In that will Lord Justice *Lindley* said he could find nothing, and Lord Justice *Bowen* said the same. But in this case I think we do find it staring us in the face, and I think that Mr. Justice *North* was led away, and very naturally, if I may say so, having been overruled in *In re Tredwell* by the Court of Appeal. He thought he would be wrong if he decided as he did before, and he gave the Court of Appeal their due in following what he thought they had held. In my judgment he was in error there. In my opinion the appeal must be allowed.

Solicitors: *Darley & Cumberland; Beckford & Hall; J. T. Rossiter.*

(1) [1891] 2 Ch. 640, 655.

M. W.

In re PALMER.
PALMER *v.* ANSWORTH.

C. A.
1893
July 25; *Aug.* 9

[1893 P. 190.]

Will—Construction—Revocation by Codicil of Gift of Share of Residue, and Direction that it should fall into the Residue.

A testator by his will gave his residuary real and personal estate upon trust as to two fifth parts for his daughters *M.* and *A.* and all other daughters born in his lifetime equally. By a codicil he declared that the share given to *M.* should be restricted to a life interest only, and that upon her death it should fall into and form part of his residuary estate:—

Held, that the share of *M.* after her death did not pass to the testator's next of kin as undisposed of, but was divisible between the other residuary legatees.

Humble v. *Shore* (1) overruled.

J. W. PALMER by his will, dated the 8th of July, 1859, devised a messuage and garden then in his occupation to his wife *Amy Palmer* during her life, or for as long as she should make it her chief place of residence, and from and after the determination of that estate he directed that the same hereditaments should fall into the residue of his real estate. And he gave all the residue of his real and personal estate to trustees upon trust to pay an annuity of £700 to his wife during her life, and subject thereto upon trust as to two equal parts thereof for his two daughters, *Martha Palmer* and *Alice M. Palmer*, and all other his daughters born in his lifetime, in equal shares and proportions, and the lawful issue of all such of the same daughters as should die under the age of twenty-one years leaving lawful issue living at her or their decease or respective deceases, in manner therein mentioned; and as to the remaining three-fifth shares upon similar trusts for the testator's two sons and their issue, and in default of any of his children or their issue becoming entitled he gave his residuary real and personal estate to his wife absolutely.

The testator made a codicil to his will, dated the 28th of July, 1859, by which, after reciting that he had by his will given a certain part or share, or parts or shares, of his residuary real and

(1) 7 Hare, 247.

C. A
1893
In re PALMER.
PALMER v. AINSWORTH.

personal estate to his daughter *Martha* absolutely, he proceeded as follows: "Now by this my codicil I will and declare that the real and personal estate so given for the benefit of my said daughter *Martha*, and all benefit and advantage to be derived by her under my said will, shall be restricted and confined to an interest for her life only, and that upon her death the same shall fall into and form part of my residuary estate." And after declaring that the income of the share of his daughter *Martha* should be for her separate use, the testator in all other respects ratified and confirmed his said will. The testator died on the 13th of September, 1871.

Martha Palmer, who was still living, married *R. W. Bigg*; and an originating summons was taken out by the present trustees of the testator's will to obtain the opinion of the Court whether the remainder expectant on the death of *Martha Bigg* in the residuary real and personal estate of the testator was disposed of by the will, or whether there was an intestacy as to the same, and what persons were entitled thereto.

Mr. Justice *Stirling*, on the authority of *Humble* v. *Shore* (1) and *Lightfoot* v. *Burstall* (2), held that there was an intestacy as to the share in question. From this decision the *Law Union and Crown Fire and Life Insurance Company*, who were assignees for value of the share of one of the residuary legatees, appealed.

Hastings, Q.C., and *E. S. Ford*, for the Appellants:—

Mr. Justice *Stirling* grounded his decision on *Humble* v. *Shore* and *Lightfoot* v. *Burstall* contrary to what he would otherwise have considered the construction of the will. But those decisions, although followed in subsequent cases, have always been followed with reluctance, and, as we contend, ought not to be considered binding authorities. The grounds upon which Lord *Cottenham* affirmed Vice-Chancellor *Wigram's* decision in *Humble* v. *Shore* are not reported (3); and Judges who have had to decide on the construction of similar clauses in wills

(1) 7 Hare, 247.
(2) 1 H. & M. 546.
(3) Their Lordships sent for the Registrar's book, and found under the date of the 12th of August, 1848, an entry of the dismissal of the appeal by the Lord Chancellor, but no statement of the grounds of his decision.

have taken advantage of minute differences to avoid the necessity of following those cases: *Crawshaw* v. *Crawshaw* (1); *In re Rhoades* (2); *In re Barker's Estate* (3); *In re Ballance* (4); *In re Hallett's Estate* (5); *Re Owen* (6); *Holgate* v. *Jennings* (7). In the present case it cannot be doubted that the testator had no intention to create an intestacy; and if the Court can see clearly the testator's intention it ought to follow it notwithstanding the construction which has been placed upon other wills.

Giffard, Q.C., and *Kenyon Parker*, for the next of kin:—

Humble v. *Shore* (8) and *Lightfoot* v. *Burstall* (9) have never been reversed, and are still binding authorities. They have been followed by numerous Judges, and conveyancers have ever since treated them as binding. To reverse them now would throw doubt on many titles: *Sykes* v. *Sykes* (10); *Cresswell* v. *Cheslyn* (11); *In re Savage's Trusts* (12). There is no distinction between the clause in question in this will and that in *Humble* v. *Shore*. With respect to the intention of the testator, no doubt he intended in his will to dispose of the whole of the interest in the share; but there is no expression of such intention in the codicil. At all events, there is no gift of it.

Baines, for the trustees.

E. S. Ford, in reply.

1893. Aug. 9. LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling* declaring an intestacy as regards the remainder expectant on the death of *Martha Bigg*. The question turns upon the construction of the will and codicil of *J. W. Palmer*. [His Lordship read the clauses set forth above, and proceeded:—] The learned Judge decided that there was an intestacy. He did so

(1) 14 Ch. D. 817.
(2) 29 Ch. D. 142.
(3) 15 Ch. D. 635.
(4) 42 Ch. D. 62.
(5) 13 Ch. D. 696.
(6) 36 Sol. J. 539.
(7) 37 Sol. J. 303.
(8) 7 Hare, 247.
(9) 1 H. & M. 546.
(10) Law Rep. 3 Ch 301.
(11) 2 Eden, 123; 3 Bro P. C. 246.
(12) 50 L. J. (Ch.) 131.

C. A.
1893
In re PALMER.
PALMER v. AINSWORTH.
Lindley, L.J.

contrary to what would have been his own opinion had he not felt bound to follow *Humble* v. *Shore* (1), better reported in the note to *Lightfoot* v. *Burstall* (2). *Humble* v. *Shore* was affirmed by Lord *Cottenham*, and was followed and approved by Vice-Chancellor *Wood* in *Lightfoot* v. *Burstall*, and by Vice-Chancellor *Hall* in *In re Barker's Estate* (3), and again in *In re Savage's Trusts* (4). It appears, moreover, from Vice-Chancellor *Hall's* judgments in *In re Barker's Estate* and in *In re Savage's Trusts*, that *Humble* v. *Shore* was followed by the Master of the Rolls and the Court of Appeal in *Homfray* v. *Darby* in 1879. But the terms of the will then before the Court are not stated. On the other hand, *Humble* v. *Shore* was disapproved by Sir *George Jessel* in *Crawshaw* v. *Crawshaw* (5), and both he and other Judges, viz., Vice-Chancellor *Bacon*, Lord Justice *Kay*, and Mr. Justice *Chitty*, whilst reluctantly treating *Humble* v. *Shore* as an authority, have relied on very slender and scarcely perceptible grounds for distinguishing it from cases closely resembling it: see *Crawshaw* v. *Crawshaw*; *In re Rhoades* (6), before Vice-Chancellor *Bacon*; *In re Ballance* (7), before Mr. Justice *Kay*; *Re Owen* (8), before Mr. Justice *Chitty*, and *Holgate* v. *Jennings* (9), before Mr. Justice *Chitty*.

It is unfortunate that the reasons which influenced Lord *Cottenham* in affirming *Humble v. Shore* are undiscoverable. The Registrar's book has been seen. Under date of the 12th of August, 1848, an entry of the case will be found that the appeal was dismissed, but there is no note of the grounds of the decision. The reasoning of Vice-Chancellor *Wigram* is in my opinion very unsatisfactory. He treats the direction, that the share shall fall into the residue, as expressing no intention as to its ultimate destination; he treats such a direction as amounting to no more than the law would imply. I cannot myself adopt this view. If a testator, after bequeathing his residuary estate in shares, simply revokes a gift of one of those shares, he takes that share out of the residue, and, that share being taken out of it, must, unless

(1) 7 Hare, 247.
(2) 1 H. & M. 546, 550.
(3) 15 Ch. D. 635.
(4) 50 L. J. (Ch.) 131.
(5) 14 Ch. D. 817.
(6) 29 Ch. D. 142.
(7) 42 Ch. D. 62.
(8) 36 Sol. J. 539.
(9) 37 Sol. J. 303.

otherwise disposed of, be treated as undisposed of (as in *Cresswell* v. *Cheslyn* (1) and *Sykes* v. *Sykes* (2)). This I follow; but when a testator revokes a gift of a share of the residue, alters the gift, and, subject to that alteration, directs the share to fall again into his residue, he does not mean that such share shall be treated as ultimately out of the residue, but as ultimately in it, and to go as part of it to those to whom he leaves it. To ascertain who are to take the residue, not only the will, but also the codicils, must be attended to; but according to *Humble* v. *Shore* (3), although a testator has disposed of his residuary estate, including a particular part of it, that part cannot be considered as going with the rest. I confess I cannot follow this. The case with which we have to deal is in some respects weaker than *Humble* v. *Shore*, because we have not got "and be disposed of accordingly." But these words do not, in my opinion, make any real difference.

In *Lightfoot* v. *Burstall* (4), Vice-Chancellor *Wood* seems to have thought it a fallacy to say that a direction that a share shall fall into the residue amounts to a gift of that share. This is true if the residue is undisposed of, but not if it is itself given to persons capable of taking it. In that case a direction that a share shall fall into the residue is a gift to those to whom the residue is itself given.

If *Humble* v. *Shore* laid down any rule of law which had guided conveyancers and others in framing wills, it might be too late for this Court, at all events, to decline to recognise and follow it. But the Vice-Chancellor, in *Humble* v. *Shore*, did not profess to lay down any rule of law. On the contrary, he sought for indications of the testator's intention, but could find none which were satisfactory to his mind. Some other Judges, following him, have construed similar wills in a similar way. The result in all those cases has been, in my opinion, to miss the intention as expressed, and, unfortunately, to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed

(1) 2 Eden, 123; 3 Bro. P. C. 246.
(2) Law Rep. 3 Ch. 301.
(3) 7 Hare, 247.
(4) 1 H. & M. 546.

C. A.
1893
In re PALMER.
PALMER v ANSWORTH.
Lindley, L.J.

with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other Judges have not been satisfied as to the intentions expressed in them, is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe.

Guided by these principles, and applying myself to this will and codicil, I see no difficulty in construing them. The testator by his codicil has cut down MRS. *Bigg's* share of the residue to a life estate, and subject to that he has directed her share to fall into the residue. By his will and codicil, taken together, he has given this share after her death to his other residuary legatees, but in what proportions it is premature to determine.

This being the testator's plain intention, sufficiently expressed to enable the Court to see it, the Court ought to give effect to it, notwithstanding *Humble* v. *Shore* (1) and other cases which have followed it, and which I for one clearly think wrongly decided.

The appeal, therefore, will be allowed; but the costs, both here and below, ought to come out of the testator's estate.

LOPES, L.J.:—

My judgment is confined to the question of intestacy. Mr. Justice *Stirling*, as regards the remainder expectant on the death of *Martha Bigg* in this case, decided that there was an intestacy. He did not so decide in accordance with his own opinion, but in deference to the case of *Humble* v. *Shore*.

This case has had an eventful and chequered existence, always criticised, sometimes approved, sometimes disapproved, distinguished from other cases when to my mind the distinction was so minute as to be almost imperceptible, and constantly treated with scanty respect both by the Judges and the profession. It is difficult to understand the principle of the decision or the reasoning by which it was arrived at. I will illustrate the effect of the decision thus. A testator, after disposing of portions of his property, gives the whole of the residue to *A.*, *B.*, and *C.*

(1) 7 Hare, 247.

equally. By a codicil he revokes the gift of the share to *C.*, and directs it to fall into the residue, and be disposed of accordingly. I can imagine nothing more clear than the testator's intention, viz., an intention to deprive *C.* of the share he had given him, and to give it equally between *A.* and *B.* Yet, if *Humble* v. *Shore* (1) is to be followed, *C.'s* share is not to fall into the residue and be divided between *A.* and *B.*, but the testator is to be taken as having died intestate as to that share. The direction that *C.'s* share is to fall into the residue and be disposed of accordingly is to be held insufficient to carry the share to the other residuary legatees or devisees. A more obvious and palpable attempt to defeat the intention of the testator it would be difficult to imagine.

The present case is not so strong as *Humble* v. *Shore*, because the words "and to be disposed of accordingly" are omitted; but in my opinion that makes no difference. It is difficult to understand how *Humble* v. *Shore* has lived so long—its only merit, if it is one, is its longevity. I think, notwithstanding its longevity, it should be overruled.

In so doing we are not violating any principle of law, for *Humble* v. *Shore* decides none, nor are we contravening any canon of construction; but we are giving effect to principles well known and long recognised, viz., that one will is not to be construed by another, that authorities as to the construction of wills are not to be servilely followed, and that, above all, it is the duty of the Court in construing wills to give effect to the intention of the testator where the language used permits.

A. L. SMITH, L.J., concurred.

Solicitors: *Robins, Hay, Waters, & Lucas*; *T. White & Sons*, agents for *Stanley, Wasbrough, & Doggett, Bristol.*

(1) 7 Hare, 247.

M. W.

C. A.
1893
July 20;
Aug. 4.

MOSTYN *v.* MOSTYN.

[1861 M. 74.]

Practice—Sale by Court—Puisne Incumbrances—Conditions of Sale—Form of Conveyance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), s. 70—*Protection of Purchaser.*

By an order in an administration action the trustees of certain land were ordered to sell it with the approval of the Judge, and the first mortgagees were to be at liberty to retain all the purchase-money in reduction of their charge. There were puisne incumbrances, the persons entitled to which were not parties to the proceedings. The property was sold in lots under conditions of sale which stated that the first mortgagees would join in the conveyance to the purchasers and release the property from their debt, but that as the debt to the first mortgagees exceeded the probable amount of the purchase-money no subsequent incumbrance would be abstracted or released; and that the purchaser should not require the concurrence in the conveyance of any person having only an equitable interest bound by the order for sale, other than the vendors who are selling as trustees. The first mortgagees, who consented to join in the conveyance, wished to insert in the grant to the purchasers the words, "according to their estate and interest in the premises and not further or otherwise," and the words, "subject to such right or equity of redemption, if any, as is subsisting in the said hereditaments, and is not by these presents conveyed or released":—

Held (reversing the decision of *Kekewich*, J.), that the purchasers were protected against the equitable interests of the puisne incumbrancers by the 70th section of the *Conveyancing and Law of Property Act*, 1881, and that they were entitled to an absolute conveyance of the estate in fee simple without any qualifying words, and to a declaration that the subsequent incumbrancers were bound by the order of the Court.

By an order in an administration action, dated the 23rd of July, 1892, the trustees of the will of the Hon. *T. E. M. L. Mostyn* were directed to sell certain land at *Llandudno* with the approval of the Judge, and the trustees of the *National Provident Institution*, who were the first mortgagees, were to be at liberty to retain the money to arise from such sale in reduction of their charge, if they should be willing to receive the same. The land was subject to subsequent incumbrances, the persons interested in which were not parties to the proceedings. The property was sold in lots under conditions of sale, of which the following are material:—

"7. The title to all the lots comprised in the foregoing par-

ticulars of sale shall commence with a general devise contained in the will dated the 18th day of March, 1858, of the late Honourable *Thomas Edward Mostyn Lloyd Mostyn*, by virtue of which all the premises are believed and shall be assumed to have become vested in the vendors for an estate in fee simple in possession, subject to mortgages of large amount. The title will consist of a print of the said will and of the codicil thereto, and a deed of confirmation or consolidation of mortgages dated the 13th of August, 1880, and a subsequent deed of further charge and certain transfers. These deeds contain recitals of or references to the former charges on the property, which recitals shall be accepted as correct and complete unless proved to be otherwise, and no purchaser shall require other evidence or information as to the creation or devolution of such charges, or as to the title prior to the date of the said will."

"8. A life annuity of £2000 per annum, to which the Lady *Henrietta Augusta Mostyn*, as the widow of the said testator, is entitled as mentioned in the said codicil to his will, and which is charged by such codicil on the whole of the testator's real and personal estate in priority to all other charges thereon, will be released by her. The first mortgagees of the premises will join in the conveyance to each purchaser, and will release the property purchased by him from all principal moneys and interest due upon the security of their mortgage; but, inasmuch as such principal moneys exceed in amount the money expected to arise by the proposed sale, which will be handed over to the first mortgagees, no subsequent incumbrance will be abstracted or released, nor shall any objection, requisition, or inquiry be made in respect of any incumbrance subsequent to that of the said first mortgagees or on account of the money secured by any mortgage or incumbrance being trust money."

"11. As regards each lot the purchaser on payment as aforesaid shall be entitled to a proper conveyance in accordance with these conditions and the foregoing particulars of the property purchased by him; such conveyance shall be prepared by and at the expense of the purchaser, and shall not contain or imply any covenant for title other than a statutory implied covenant against incumbrances, and the purchaser shall not require the

C A
1893
MOSTYN
v
MOSTYN

concurrence in the conveyance of any person having only an equitable interest bound by the order for sale, other than the vendors who are selling as trustees of the will of the said testator."

Two of the lots were purchased by *T. Barker* and *A. Evans* respectively. The conveyance, as prepared by the purchasers in each case, was made between the trustees of the *National Provident Institution* of the first part, and the trustees of the will of the second part, Lady *Henrietta Augusta Mostyn* of the third part, and the purchaser of the fourth part, and the conveyance was made to the use of the purchaser "in fee simple, absolutely discharged from all principal and interest owing to the mortgagees and from all claims and demands for or on account of the same or otherwise howsoever," to which the mortgagees added the words, "but subject to such right or equity of redemption (if any) as is subsisting in the said hereditaments and is not by these presents conveyed to the purchaser or released." The mortgagees also added the words in the clause by which they conveyed the estate, "according to their estate and interest in the premises and not further or otherwise . . . ." and they made also some minor alterations. On an application to Mr. Justice *Kekewich* by the purchasers to settle the conveyances, his Lordship held that under the conditions of sale the purchasers had only contracted for a title subject to the charges of the subsequent incumbrancers, who did not join in the conveyance and were not parties to the proceedings and that the vendors, who supported the alteration of the mortgagees, were entitled to insist upon the conveyance in its altered form The purchasers appealed from this decision.

Warmington, Q.C., and *E. P. Hewitt*, for the Appellants:—

We are entitled, under the conditions of sale, to a conveyance in fee simple free from incumbrances. Neither we nor the vendors intended that we should require the concurrence of the equitable incumbrancers who were bound by the order; but there are incumbrancers who are not bound by the order for sale, and either they must join or the vendors must get an order binding them, or give us covenants against them. The Respondents rely upon the 70th section of the *Conveyancing and*

Law of Property Act, 1881 (1). But if we are protected by that section the conveyance, as altered by them, is wrong, for it gives us no absolute conveyance in fee simple, and suggests the existence of existing incumbrances. If the Court is satisfied that it was intended that a purchaser should have a clear estate in fee simple it will prevent him from being tricked by the form of the conveyance: *Else* v. *Else* (2).

Renshaw, Q.C., and *Warrington*, for the Respondents:—

The purchasers did not contract for a conveyance free from subsequent incumbrances, but only from the charges of such persons as were bound by the order for sale; but they are, in fact, protected from all subsequent incumbrances by the 70th section of the *Conveyancing Act*, and the persons entitled to such incumbrances cannot come against them, but must look to the proceeds of the sale: *In re Hall Dare's Contract* (3). The form of conveyance as altered is correct; the mortgagees and vendors can only convey such interest as they have, and can only give such covenants, express or implied, as are consistent with their interests, and the purchasers must rely for anything beyond that on the statute: *Dart's* Vendors and Purchasers (4).

E. P. Hewitt, in reply:—

The decision in *In re Hall Dare's Contract* does not go the extent which the Respondents contend. They rest on some wide words of Sir *George Jessel*. It is a mere illusion to say that we are to look to the purchase-money, for the conditions of sale state that the whole will be paid to the first mortgagees. When property is sold by the Court subject to incumbrances the money is ordered to be paid into Court by sect. 5 of the *Conveyancing Act*: *Seton* on Decrees (5).

(1) 44 & 45 Vict. c. 41, s. 70, so far as it is important to the present case, is as follows:—

Sub-sect. 1: "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

(2) Law Rep. 13 Eq. 196.

(3) 21 Ch. D. 41.

(4) 6th Ed. vol. ii. pp. 1351, 1352.

(5) 5th Ed. vol. i. p. 295.

C. A.
1893
MOSTYN
v.
MOSTYN.

1893. Aug. 4. LOPES, L.J.:—

On the 23rd of July, 1892, an order was made in an administration suit for the sale of the land in question with other land, the vendors being the trustees of the will of the Hon. *Thomas Edward Mostyn Lloyd Mostyn.* By such order it was directed that the land should be sold, with the approbation of the Judge, and that the trustees of the *National Provident Institution* (the first mortgagees) should be at liberty to retain the money to arise by such sale in reduction of their charge, if they should be willing to receive the same. The first mortgagees, who have the legal estate, were not parties to the administration suit nor parties to the sale. They are only parties to the conveyance for the purpose of conveying the legal estate and releasing their mortgage debt. The first mortgagees, moreover, are not before the Court. Lady *Henrietta Augusta Mostyn* was entitled to an annuity of £2000 per annum on the property in priority to all other charges; this she releases by the proposed conveyance, and no question arises as to this. The property was subsequently sold, subject to certain conditions of sale, and the applicants, *Thomas Barker* and *Adonizah Evans*, became the purchasers of lots 19 and 37, and they applied that their conveyances of the property might be settled by the Judge in Chambers. Such applications were adjourned into Court and were heard by Mr. Justice *Kekewich*, who directed the conveyances to be settled in a way which has given rise to this appeal. There were puisne incumbrances. The purchasers contended that they were entitled to a clean title. The learned Judge held that the purchasers were bound to take the property subject to all mortgages other than the first mortgage, which is released. I think this view is erroneous. It appears to me that the case as between the vendors and purchasers is not difficult. Having regard to the conditions of sale, the purchasers, in my judgment, have contracted for, and are entitled to, a conveyance of the property purchased for an estate of inheritance free from incumbrances. The case depends upon the conditions of sale, 7, 8, and 11, and sect. 70 of the *Conveyancing Act*, 1881. The learned Judge has not dealt with the 11th condition of sale, nor with sect. 70 of the *Conveyancing Act.* [His Lordship read Conditions 7 and 8, and continued:—]

There is a clear notice in these conditions of puisne incumbrances, and if there were no other conditions I should agree with the learned Judge below. But then comes Condition 11, which contains these words: "And the purchaser shall not require the concurrence in the conveyance of any person having only an equitable interest bound by the order of sale"—that is, as I read it, who are bound by the order for sale. I do not doubt but that whoever prepared that condition had in mind sect. 70 of the *Conveyancing Act*, 1881. [His Lordship read the section.] This section was considered in the Appeal Court in *In re Hall Dare's Contract* (1). In that case Sir *George Jessel* after reading the 70th section, said (2): "The only reason suggested why the sale here should not be protected by that section is that the section is not to apply where it can be seen upon the face of the order that the order is wrong. But who is to see it? The purchaser cannot see it. It is true a learned lawyer acquainted with all the provisions of the Act may find it out, but in no other sense does it appear on the face of the order. No person not familiar with the provisions of the *Settled Estates Act* would find anything on the face of this order to lead him to suspect that it was wrong. Now to ask us to hold that whenever there appears on the face of an order something which would lead a person of sufficient learning and acquainted with the practice to the conclusion that the order is irregular, the 70th section does not apply, would be asking us to repeal a very plain enactment which was made for the protection of purchasers. The purchaser sees an order for sale made by the Court which has jurisdiction in the matter, and he is not to trouble himself any further. If any mistake has been made still he is to get a good title, all claims of the persons interested in the estate being transferred to the purchase-money." The purchasers in this case are, in my opinion, protected by the order of sale of the 23rd of July, 1892, from puisne incumbrances. As I read Condition 11 it is so stated, and correctly stated. The purchasers as against the vendors, in my judgment, are entitled to have the property conveyed to them for an estate of inheritance free from incumbrances, and as between the vendors and

(1) 21 Ch. D. 41. (2) 21 Ch. D. 46.

C. A.
1893
MOSTYN
v
MOSTYN
Lopes, L.J.

purchasers the conveyance must be so framed. So far as I understand, there is no substantial difference between the vendors and purchasers as to the form of the conveyance. The alterations objected to by the purchasers are those introduced by the first mortgagees. They are not before the Court; they are not parties to the contract for sale; and the Court has no power to compel them to submit to the purchasers' requirements. If the first mortgagees insist upon requiring anything to be inserted which is antagonistic to the estate of inheritance free from incumbrances to which the purchasers are entitled they must decline to complete the purchase. If the vendors can induce the first mortgagees to withdraw the portions of the conveyance proposed by them, to which objection is made as being inconsistent with the estate to which they are entitled, then the conveyance must be settled as a conveyance of an estate in fee simple free from incumbrances; and if they cannot agree as to its form, then by one of the conveyancing counsel of the Court. The appeal must be allowed, and the Respondents must pay the costs of the appeal and in the Court below.

A. L. SMITH, L.J.:—

In this case three questions arise for determination. 1st. What is the true construction of the conditions of sale under which Mr. *Barker* and Mr. *Evans* purchased the property in question at the sale. 2ndly. What estate therein are they entitled to have conveyed to them? And 3rdly. Has a proper conveyance of such property been tendered to them?

The sale took place under an order of Court, the estate, part of which is now in question, being at that time administered by the Court. I am of opinion that Conditions 7 and 8 gave full notice to purchasers that what was being sold and what they were to purchase was an estate in fee simple in possession subject to mortgages to a large amount; that the first mortgagees in possession would join in the conveyance to the purchaser and release the property purchased from all principal and interest due upon the security of their mortgage; but that no subsequent incumbrances would be abstracted or released, the reason being that, as the first mortgagees' claim would exhaust all moneys

likely to arise from the sale, subsequent incumbrances would not be dealt with. These two conditions gave explicit notice of these facts. But the 11th condition of sale must be also read in conjunction with Conditions 7 and 8. [His Lordship read Condition 11.] These three conditions when read together import that there is a first mortgagee, and that there are also subsequent incumbrancers who have equitable interest, and that the purchasers shall not require the concurrence of these, for they are bound by the order which ordered the sale.

Mr. Justice *Kekewich* does not appear to have dealt with Condition 11, but founded his judgment on Conditions 7 and 8, and it is this which causes me to differ with him. The first and principal case made on behalf of the purchasers was that the conditions of sale were to be read as above mentioned, and that, as there were subsequent incumbrancers who had not concurred in or consented to or had notice of the order of sale, they were not bound by it, and that therefore the purchasers, Messrs. *Barker* and *Evans*, had not got what was contracted to be sold to them, and what they contracted to purchase, viz., an estate in fee simple free from incumbrances. If this point had been established I should have thought that the purchasers were in the right in objecting as they did to complete the purchase; but to this it was answered that it is not true that the subsequent incumbrancers are not bound, for they are bound by the order for sale by reason of sect. 70 of the *Conveyancing Act*, 1881, which in the circumstances which exist prevents these incumbrancers from taking objection to the order of sale as against the purchasers. Section 70, so far as material, is as follows. [His Lordship read the section as set forth above.]

This section is explicit: it enacts that where a sale takes place under the order of the Court it shall not be invalidated as against the purchaser by any one alleging that he has not concurred in or had notice of or consented to the order; and this would be the position taken up by these subsequent incumbrancers if the purchasers' anticipation of what they might do were correct. In my judgment, this section incapacitates such incumbrancers from taking the point suggested. The section was intended to make, and did make, an order for sale by a Court of competent jurisdiction binding; and no objection

C. A.
1893
MOSTYN
v.
MOSTYN
L. Smith, L.J.

can be taken to it thereafter as against a purchaser by reason of non-concurrence, want of notice, or want of consent; and the case of *In re Hall-Dare's Contract* (1) shews this to be so.

For these reasons, in my judgment, the vendors are in a position to tender to the purchasers an estate in fee simple free from incumbrances.

But another point was then taken by the purchasers, which was, that the conveyance tendered to them as settled by the vendors and first mortgagees upon the face of it shews that they (the purchasers) have not an estate in fee free from incumbrances and I think that this point is well founded. By the conditions of sale the first mortgagees were to join in the conveyance and release the property purchased from the principal moneys and interest due thereon upon the security of their mortgage. But these first mortgagees are not before the Court, and we have no jurisdiction over them. If the vendors cannot prevail upon these first mortgagees to forego the objectionable paragraphs they have insisted on in the proposed conveyance, the purchasers are entitled in my judgment to refuse to complete, for the purchasers are not bound to take the conveyance as now settled by the vendors and mortgagees. There are recitals and passages therein which would leave it doubtful if they (the purchasers) have an estate in fee simple free from incumbrances.

If the vendors are enabled to obtain this consent from the first mortgagees then this conveyance should be settled as a conveyance of an estate in fee simple free from incumbrances; and in case of dispute it should be so settled by one of the conveyancing counsel to the Court. If not, then, in my judgment, the purchasers are entitled to refuse to complete. For the reasons above I think this appeal should be allowed, and that the Respondents must pay the costs of this appeal and below.

There must be a declaration that the subsequent incumbrancers are bound by the order of the Court.'

Solicitors for Appellants: *Belfrage & Co.*, agents for *Chamberlain & Johnson, Llandudno.*

Solicitors for Respondents: *Hulberts & Hussey.*

(1) 21 Ch. D. 41.

M. W.

In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK.

C. A.
1893.
VAUGHAN WILLIAMS, J.
July 1.
C. A.
July 12, 13.

Company—Winding-up—Scheme of Arrangement—Meeting of Creditors—Proxies—Creditors Abroad—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 15, *sub-s.* 3; *s.* 80.

A chartered banking company, the principal business of which was in *Australia*, stopped payment, and was ordered to be wound up in this country. A scheme of reconstruction was proposed, by which a new bank was to be established, which was to defray the liabilities of the old bank with certain exceptions. The Judge directed meetings of the shareholders and creditors to be held in order to ascertain their wishes as to the scheme. It being necessary that this should be done without delay, and the great majority of the creditors being resident in *Australia*, the Judge made an order directing a form of proxy to be sent by the Official Receiver by telegraph to *Australia* appointing specified persons to vote for or against the scheme at the *London* meeting; the proxy papers were to be executed by the creditors in *Australia* and deposited at the offices of the company at the principal cities in *Australia* not later than three days previous to the meeting in *London*, and the particulars and number of the proxies for and against the scheme were to be telegraphed to the Official Receiver. This was done, and the result declared at the meeting in *London*, when it was found that more than the statutory number of the creditors, including the Australian creditors, were in favour of the scheme, but that if the Australian votes were not counted the resolution in favour of the scheme would not have been carried. Under these circumstances the Judge sanctioned the scheme. Some of the Scotch and English creditors appealed from this decision on the grounds (1.) that the scheme was improvident and unfair towards the creditors generally; (2.) that the Judge had no power to order the result of the Australian proxies to be communicated by telegram to the meeting, but that the proxies ought to have been produced at the meeting; (3.) that the Australian proxy papers were irregular in naming a particular person as agent for the voter; (4.) that as to some of the proxy papers, which were stamped with a penny stamp, the day of the meeting at which they were to be used was not inserted, and, therefore, they were void under sect. 80 of the *Stamp Act*, 1891:—

Held (affirming the decision of *Vaughan Williams*, J.), (1.) that following the principles laid down in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1), as there was nothing unreasonable or unfair in the scheme as between different classes of creditors, the Court would defer to the expressed opinion of the great majority of the creditors; (2.) that the Judge had power under the *Joint Stock Companies*

(1) [1891] 1 Ch. 213.

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK

Arrangement Act, 1870, s. 2, to direct the particulars of the Australian proxies to be telegraphed to the Official Receiver and the proxies to be counted at the meeting, there being no necessity that the proxy papers should be produced at the meeting; (3.) that the proxy papers were not irregular on account of the agent being named on the form; and (4.) that the proxies on which the day of meeting was not named would be good if stamped with a ten shilling stamp within thirty days of their being received in *England* under sect. 15, sub-sect. 3, of the *Stamp Act*, 1891.

THE *English, Scottish, and Australian Chartered Bank* was a chartered banking company whose business was principally in *Australia*, and which had branches at *Melbourne, Sydney, Adelaide*, and *Brisbane*. The bank having stopped payment, a winding-up order was made by Mr. Justice *Vaughan Williams*, and a scheme was afterwards proposed for the reconstruction of the company under the provisions of the *Joint Stock Companies Arrangement Act*, 1870. Under this scheme it was proposed that a new bank should be formed and registered under the *Companies Acts*, to be called the *English, Scottish, and Australian Bank, Limited*, with a share capital of £1,575,000, in 45,000 shares of £35 each. Certain specified claims to the amount of £838,000 were to be borne by the old bank, and the remainder of the liabilities were to be borne by the new bank, which was to take over the assets of the old bank with certain exceptions. The new bank was to pay in cash the preferential debts of the old bank, and all its debts on current account under £50 in amount, and to pay the rest of the unsecured creditors of the old bank, as to one-fourth in debenture stock, as to one-fourth in terminable deposit receipts, and as to the remaining half in inscribed deposit stock. Mr. Justice *Vaughan Williams* made an order directing meetings to be held of the creditors and shareholders to ascertain whether they consented to this scheme. The far greater number of the creditors of the bank resided in *Australia*, and the learned Judge accordingly directed meetings to be held in *Melbourne, Sydney, Adelaide*, and *Brisbane*, as well as in *London*, at which the shareholders and creditors might vote personally or by proxy. For this purpose he directed that the Official Receiver should send a form of proxy to the shareholders and creditors in *Great Britain* and also in *Australia*. The form of proxy sent to the creditors in *Great Britain* empowered a named person, or, him failing,

another named person, "as my proxy, to act for me at the meeting to be held in *London* on the 12th of June, 1893, for the purpose of considering, and, if thought fit, approving a scheme of arrangement dated the 17th of May, 1893, with or without modifications; which meeting is to be held pursuant to orders made in this matter on the 18th of May, 1893, and at such meeting, or any adjournment thereof, to vote for me and in my name for the said scheme, either with or without such modifications as my proxy may approve." In the margin opposite the word "for" was this note: "If against, strike out the word 'for' and insert the word 'against.'" The proxies furnished to the creditors in *Australia* were substantially in the same form, but a large number of them did not contain the date of the meeting to be held in *London*.

The order of the Judge then contained the following provision: "That the creditors and contributories in *Australia* be at liberty to give proxies to persons to be designated by the Official Receiver for or against the scheme, or to any other persons entitled to vote at the meetings whom they may think proper; provided that such proxies be deposited at the offices in *Melbourne* or *Sydney* of the company not later than three days prior to the holding of the meetings in *London*, and that particulars of the proxies so deposited be communicated by telegram to the Official Receiver for use at the meetings."

Under this order the Official Receiver telegraphed to his representative in *Australia* the form of proxy to be sent to the shareholders and creditors in that country. Meetings were held in *Melbourne*, *Sydney*, *Adelaide*, and *Brisbane*, and the scheme was approved by them all, and proxies for the meetings in *London* were deposited in pursuance of the order. The particulars of these proxies were telegraphed to the Official Receiver and were counted at the *London* meetings. At the meeting of creditors in *London* 143 creditors, whose debts amounted to £192,139, voted for the scheme, and 33 creditors, whose debts amounted to £75,646, voted against it. The Australian proxies shewed that 5299 creditors, whose debts amounted to £2,436,832, voted for the scheme, and 126 creditors, whose debts amounted to £74,508, voted against it. The total of the debts represented was

C. A
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK.

£2,779,125. Under these circumstances there was a sufficient statutory majority in favour of the scheme, but not without counting the Australian proxies.

The Official Receiver accordingly presented a petition for the sanction of the scheme, which was opposed by seven Scotch insurance companies, namely, the *North British and Mercantile*, the *Edinburgh Life*, the *Scottish Widows' Fund*, the *Scottish Union and National*, the *Life Association of Scotland*, the *Caledonian*, and the *Scottish Life*, who were creditors for £92,000, and other dissentient depositors to a large amount, representing debts amounting together with those of the Scotch companies to about £262,293.

The petition was heard before Mr. Justice *Vaughan Williams* on the 1st of July, 1893.

Latham, Q.C., and *Howard Wright*, for the Petitioner, the Official Receiver and Liquidator of the Bank, stated the facts, and asked the Court to sanction the scheme.

Finlay, Q.C., *Beale*, Q.C., and *C. E. E. Jenkins*; *Buckley*, Q.C., and *Warrington*; *Vernon R. Smith*, *Moloney*, and *A. J. Allen*, for the opposing creditors:—

The scheme is framed in the interest of the contributories rather than in that of the creditors. The assets being ample, the creditors have nothing to fear from a winding up by the Court. The *Joint Stock Companies Arrangement Act*, 1870, contemplates the preparation and sanctioning of a fair scheme, but does not authorize the sacrifice of the interests of creditors in favour of those of shareholders. The assent of the requisite number of creditors has not been obtained. How is the majority of creditors to be ascertained? The meetings held in *Australia* cannot be taken into account. The proxies given in *Australia* and telegraphed to this country cannot be accepted, and if they are not counted, the majority required by the Act has not been obtained. The proxies themselves are not good. They are not neutral, and they are so framed that they cannot without difficulty be altered so as to authorize voting against the scheme. Another objection is, that the proxies were not produced at the meeting. The proxy must be in writing, and it is the invariable practice, when

voting by proxy is allowed, to require the production of the proxy papers at the meeting. The old shareholders who take shares in the new bank may escape from liability by assigning their shares, unless the new bank is wound up within a year after the transfer.

Sir *H. Davey*, Q.C., and *Whinney*, for a committee of creditors in favour of the scheme, and *Cozens-Hardy*, Q.C., and *Swinfen Eady*, for other creditors supporting the petition :—

No one has been misled by the proxy paper, the form of which is sufficient to enable persons to vote for or against the scheme. The first question is whether the votes of the creditors in *Australia* were given in the proper manner. That depends on general considerations, on the constitution of the company, and on the order of the Court. Although the bank carried on business in *Australia*, it was an English company, and this is the principal winding-up. The case is therefore governed by the English Act of Parliament. Sect. 2 of the Act empowers the Court to order that a meeting of "the creditors or any class of creditors" "shall be summoned in such manner as the Court shall direct." Every creditor, whether in *Australia* or *England*, has a right to vote, and any meeting at which the Court had omitted to give the Australian creditors an opportunity of voting would be an idle form. The longer matters remain unsettled the more difficult it will be to put the bank on its legs again, and if any scheme is to be started to set it going again, it is necessary that what is to be done should be done quickly. This is a new case requiring new action. The Court was asked to order preliminary meetings to be held in *Australia*; but these were not meetings within the Act of 1870, but meetings called to ascertain the views of the Australian creditors. The Australians have never complained that they have had no opportunities of discussing the situation. It is a favourite argument of minorities to insist that they have not had an opportunity of full and adequate discussion. Sect. 2 of the Act of 1870 enables votes to be given by proxy; but it leaves it to the Court to say how the voting by proxy is to be effected. The fallacy seems to be that the proxy is the paper and not the person appointed to vote.

C. A.
1898
In re English, Scottish, and Australian Chartered Bank

There is no statute, rule, or practice requiring proxy papers to be deposited at the meeting. If the practice is to be laid down by analogy to Table A of the *Companies Act*, 1862, or to the *Companies (Winding-up) Act*, 1890, the persons who vote do not bring their proxy papers to the meeting, but such papers are deposited previously to the meeting. There is no provision even requiring the appointment of the proxy to be in writing. The question really is whether the proxy is duly authorized to act.

[Vaughan Williams, J.:—The proxy may be good here without going so far as to say that it need not have been in writing.]

At any rate, there is no authority that the paper must be produced at the meeting. If the voice of the Australian creditors was to be heard at all, it was necessary to provide that the deposit of proxy papers should be made in some other way. The order accordingly provided for their being deposited in *Australia*, and provision was made that the result of the proxy voting should be notarially cablegrammed to this country. Therefore, the only ground of objection is that the papers were deposited in *Australia* and not in *London*. But the Court, having regard to the circumstances, was entitled to provide special machinery for such a new case as this. Notwithstanding the time which has elapsed, no one has ventured to suggest that the notarial cablegram is incorrect. The Court was bound to ascertain the views of the Australian creditors. The English creditors are not a "class of creditors" within the meaning of sect. 2. The locality of certain creditors does not make them a class. The scheme is one which ought to be sanctioned. The Court has to see that the provisions of the statute have been complied with, that the majority has acted *bonâ fide*, that the minority has not been overridden by a majority having interests of its own clashing with those of the minority, and that the scheme is one as to which persons acting honestly, and viewing the scheme in the interests of those whom they represent, take a view which can be reasonably taken by honest men: *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1).

(1) [1891] 1 Ch. 213.

The Court may take judicial notice of the difficulty which now exists of raising money in *Australia*, and that to pay off creditors a large sum would have to be got out of assets for which the company cannot get a bid. The memorandum and articles can be so framed as to prevent the old shareholders escaping from their liabilities.

Beale, in reply.

Vaughan Williams, J.:—

This is a petition by which I am asked to sanction a scheme which, it is said, the creditors of the bank have approved at a meeting held in pursuance of an order made by me under the *Joint Stock Companies Arrangement Act*, 1870, on the 18th of May, 1893. When that order was applied for, I told the Applicants that they took it at their own risk. It was quite obvious that the order asked for was a novel order, and one which was intended to meet a state of things which, as far as I know, had not previously arisen. One obvious difficulty was that a great part—in fact the majority—of the creditors of the bank were not resident in this country, but in the Australian colonies. The meeting of creditors which it was proposed to hold was a meeting at which it was quite plain that all creditors of the bank had a right to be present and to express their views by their vote; but it was urged that it would be quite useless to attempt to carry the proposed scheme into effect if the meeting was postponed until instruments of proxy from *Australia* had been sent to this country; and it was suggested that this difficulty might be got over in this way—that telegrams might be sent to the colonies stating the substance of what was proposed to be done in *England*, and putting before the Australian creditors the very scheme which it was proposed to submit at the meeting, that forms of proxy might be telegraphed and supplied to the Australian creditors by an agent of the Official Receiver in *England*, that the creditors in *Australia* could execute those proxies in favour of persons in *England*, and that when the meeting came to be held these Australian creditors would be able to be present at the meeting by means of these proxies. And, in order that it might not be

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK
Vaughan Williams, J

said that the Australian creditors were voting without having in the colony any discussion of the scheme submitted to the creditors, it was suggested that my order should direct the holding of subsidiary meetings in the colonies at which the matter could be discussed before the Australian creditors executed the proxies sent to them for execution. I had very considerable doubt whether I had jurisdiction to make the order asked for, but I did make it. It was an order which had been drafted with great care, and was as well drafted and as well adapted for the purpose for which it was intended as could be—provided only that I had the jurisdiction to make the order at all.

When I came to consider whether I had jurisdiction to make the order, I could not, it seemed to me, but take into consideration what I may call the tide of authority. The decisions of twenty years or a quarter of a century ago shew the strongest possible feeling that one ought never to deprive any creditor of his common law right, and ought never to require him to give up anything to which he is by law entitled, at the will of the majority of the creditors, unless all the steps which are provided by the statute have been most carefully followed, and the tendency was to construe in the strictest possible manner any statute which gave to the majority of creditors the right to impose their will upon the minority. But I do not think that anyone who has followed the subsequent decisions—whether under the *Companies Acts* or the *Bankruptcy Acts*—will hesitate to say that the tendency of late has been rather to favour the power of the majority of creditors to impose their will upon the minority and to construe the legislation upon the subject with some freedom. In fact, whatever the subject-matter of legislation, the tendency of the Courts, rightly or wrongly, has been to construe Acts of Parliament with freedom, and to approach nearer to legislation by construction than the Judges in former days used to consider themselves entitled to do. I therefore feel that I ought to construe this Act of Parliament freely, and to try, as far as I can, to adapt it to the particular necessity which has arisen in this case.

The scheme is objected to on two grounds. Those two grounds divide themselves into a number of minor heads; but the two

main categories of objection are as follows: First, there is the legal objection that the scheme has not been adopted by the proper majority (that is to say, by a majority of three-fourths in value, because, if you take the creditors in the *United Kingdom* only, you have not got that majority, and it is admitted that that is so) and that although if you include the Australian creditors who claim to have been present by proxy you have got the necessary majority, as a matter of law those persons have no right to be counted as having been present by proxy at the meeting. The second category of objections is that the scheme is not really a scheme of arrangement or a scheme of compromise at all, but that what it does is merely to take away from creditors who, on the balance-sheets presented to the creditors, are entitled to a large payment in cash—to a payment in cash which would amount to a large percentage of their debt—the right to receive that payment, and to substitute for it a payment of nearly 25 per cent. coupled with the right to receive annuities, more or less secured, and more or less in priority to creditors and shareholders of the new bank proposed to be constructed on the ruins of the old bank.

I will deal with the two classes of objections separately. First, as to the legal objection: Before reading the words of the Act of Parliament I should like to consider a little what it is, and where its place is amongst Acts of Parliament. It seems to me that the *Joint Stock Companies Arrangement Act*, 1870, is only one in a series of Companies Acts It is a unit going to make up the statutory total which governs the law of companies in this country, and I treat it as supplemental, therefore, to the principal Act of 1862, and I agree that in all probability it is right to treat it as an enlargement of the provisions of the 159th section of the Act of 1862. That section provides as follows: "The liquidators may, with the sanction of the Court, where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors or persons claiming to be creditors, or

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK
Vaughan Williams, J.

persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable." But although I regard the Act of 1870 as supplemental to the *Companies Act* of 1862, and, perhaps, to the section I have read, I would point out that it is plain that the Act of 1870 is really an Act which relates to liquidation, and which substitutes in form a mode of liquidation for that which prevails under the general provisions of the Act of 1862. The arrangement to be submitted to the creditors is an arrangement between "a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up," and, therefore, in construing sect. 2 of the Act of 1870, one should bear in mind that the Act is not only a complement to the *Companies Act*, 1862, but, is also a mode of liquidation. I mention that because it furnishes, to my mind, one line for the construction of the statute, and that is this, that, in construing the statute, one must bear in mind the principles upon which liquidations are conducted, in different countries and in different Courts, of one concern. One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the Court where the main liquidation is going on—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation.

Having said that, I propose to read the section. [His Lordship read sect. 2 of the *Joint Stock Companies Arrangement Act*, 1870, and continued as follows:—]

It seems to me that the right course to take under the section may vary according as the Court has to deal with a principal or ancillary liquidation. According to my view, I have here to deal with a principal liquidation, and, that being so, I am bound to make provision for creditors in all parts of the world

coming in and being heard if they think fit. When once one has arrived at that conclusion, the question is how such provision is to be made. It is quite plain that the creditors who are abroad cannot be expected to come and be present personally. They must therefore be present by proxy. One cannot doubt that, in ascertaining what is the meaning of being present by proxy, and how a creditor is to be present by proxy, one must have regard to the *Companies Acts* generally.

Now, under the *Companies Acts* generally, there can be, to my mind, no doubt that the authority of the proxy must be in writing, and I consider it as quite plain that when this section speaks of being present by proxy, it means a proxy authorized in the way pointed out by the previous statutes and the practice under the *Companies Acts*—that is, by an instrument in writing. There was no difficulty in enabling the creditors abroad to execute such proxies, because, with the advantage of the cable telegraph, the direction to hold the proposed meeting could be communicated to them, and a form of proxy sent to each creditor entitled to vote. But it was said further, not only that the instrument of proxy must be in writing, but that such instrument must be produced at the meeting. Proxies by creditors are no new thing. They have been used in all sorts of legislation relating to the administration of estates, and no doubt, generally speaking, the instrument of proxy (whether it has or has not been previously deposited in Court or with an officer named by the Court) is produced at the meeting. But am I bound by such a practice in a case where its adoption would defeat the scheme, and perhaps damage the interest of creditors generally? I have come to the conclusion that I am not bound by that practice, that there is no statutory practice laid down, and that there is no rule requiring the production of the proxy at the meeting. It is true that sect. 2 of the Act of 1870 says only that the "meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct," and does not say that the voting shall be conducted or that the proceedings shall be held in such manner as the Court may direct; but I think that the Court has an inherent power to direct the mode in which meetings shall be held, and the mode in which proxies

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK
Vaughan Williams, J

shall be evidenced, and to determine all such questions as whether it is necessary that the proxy should be produced at the meeting.

On the whole, therefore, I have come to the conclusion that the legal objection fails. I think that I had jurisdiction to make the order which I have made, and that such order has been properly carried out. Divers minor objections have been made to the mode in which the order has been carried out, but I have arrived at the conclusion that I ought not to give way to those objections. Therefore I hold as a fact that this scheme has been agreed to by a majority in number representing three-fourths in value of the creditors, present either in person or by proxy.

Having arrived at that conclusion, there still remain the very grave objections which have been urged against this scheme. I confess that I have very little belief in creditors of a company being able to look after their own interests. It is a matter of history that—never mind what safeguards may be suggested, never mind what statutory precautions may be given—the creditors of an individual bankrupt have never been roused to look after their own interests. One Lord Chancellor after another has a pet scheme which he thinks will really rouse the creditors to a sense of what is due to themselves, and so far educate them as to make it safe to entrust them with the management of their own affairs; but experience shews that creditors, whether of a company or of an individual man, never can be trusted to take care of themselves. The disjected forces of individual creditors are a mere nothing as against the consolidated forces of those who are often deeply interested in bringing about an adoption of the scheme which is presented to the creditors. Schemes are presented to the creditors in bankruptcy and in the liquidation of companies more often than not, I have no hesitation in saying, for the purpose of veiling some wrong that has been done, or for the purpose of serving some interest which is wholly antagonistic to the interest of the creditors. If any one takes the trouble to look through a list of the phœnix companies which have been based upon a reconstruction after the failure of some big bank or company, and to

put down on the one side the number of such phœnix companies which have been successful, and on the other side the number of such companies which have been failures, one side will be full and the other side will be nearly empty, and I say that for that reason, speaking for myself, I am not at all disposed to think that the creditors are able to take care of themselves, or ready to suppose that when the Legislature threw upon a Judge the duty of sanctioning the scheme agreed to by the creditors, he, in the absence of fraud, or in the absence of voting obviously for oblique reasons, was practically bound to sanction the scheme adopted by the creditors.

I think that the Judges who administered the law shortly after the passing of the *Bankruptcy Act*, 1869, shewed a much truer perception of the weakness of creditors and of the intention of the Legislature. They by no means adopted a scheme simply because a majority of the creditors voted in favour of the scheme and there was no affirmative evidence of any corruption or any wrong motive of voting. They took the scheme and looked at it, and ascertained from broad grounds whether it was plainly for the benefit of the creditors; and if it appeared not to be for the benefit of the creditors, or if the benefit to accrue to the creditors was unintelligible and difficult to grasp, the scheme was never sanctioned or approved. But I am well aware that under the *Companies Acts* it has always been different. Under the *Companies Acts* greater attention has been given to the wishes of the creditors, and I feel that the very words of some of the sections of the *Companies Acts* as to the regard to be had to the wishes of creditors justify the conclusion that the Legislature may have meant something more with regard to the wishes of creditors in the case of companies than it was held to have meant with regard to individual bankrupts under the *Bankruptcy Act*. At all events, be that how it may, I am of opinion that I have no choice but to follow the rule that has been laid down by the Court of Appeal in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1). I do not now, any more than I did in the course of the argument, agree with the suggestion made by Sir *Horace Davey* as to the meaning of the

(1) [1891] 1 Ch. 213.

C. A.
1893
In re English, Scottish, and Australian Chartered Bank
Vaughan Williams, J

following words of Lord Justice *Lindley* (1): "The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonâ fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent." Sir *Horace Davey* suggested that the Courts had no option or discretion but to approve the scheme, unless there was evidence which justified them in saying that the majority were not acting *bonâ fide*, or were "coercing the minority in order to promote interests adverse to those of the class whom they purport to represent"—a passage which Sir *Horace Davey* seemed to think was practically identical in effect—a mere alternative statement—with that immediately preceding, "whether the majority are acting *bonâ fide*." But it seems to me that the words of Lord Justice *Lindley*, which immediately follow those which I have read, shew that that is not what Lord Justice *Lindley* meant. He proceeds as follows: "And then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it." Then Lord Justice *Lindley*, when he proceeds to deal with Mr. *Rigby's* argument in detail, plainly declines to treat the matter as resting upon the mere basis that the resolution of the creditors, not having been shewn to be *malâ fide*, leaves him no discretion. He goes on to deal with the question of whether the scheme is a reasonable scheme or not, and says (2), "Therefore, if you look at it from a commercial point of view, and not from a lawyer's point of view, you are in a decidedly better position by this scheme than you would be if things were left alone. That is the view of the majority. Now can anybody say that this is not a reasonable view for the majority to take? Whether they have other interests or not, I think we ought to see whether anything can be said against the reasonableness of the view taken by the majority of the first debenture-holders, without reference to whether they are second debenture-holders, or whether they are shareholders or not. Can anybody say that this scheme is not in a commercial sense extremely advantageous to them, having

(1) [1891] 1 Ch. 239. (2) [1891] 1 Ch. 242.

regard to their position?" Then Lord Justice *Bowen* and Lord Justice *Fry* deal with the matter in much the same way, with this exception, that it is quite obvious that they think that the *onus* of shewing that the scheme is unreasonable is rather on those that object to the scheme than on the majority of the creditors who have supported it. These two judges seem to me to hold that the duty of the Court is to approve of the scheme, unless there is something before it which shews it either that the scheme was not made in good faith, or that it is a scheme that, so far from being fair and reasonable, is one that an intelligent and honest man, acting alone in respect of his interests, could not approve of.

I have had very considerable doubt upon this point. It does seem to me that there are very serious objections to this scheme. I am not at all sure that if I had been a creditor I should have voted in favour of the scheme. It seems to me that there are large available liquid assets which might be paid over immediately to the creditors, but which are appropriated really to the establishment of a new bank. But then it is said that the majority of creditors clearly think (and the expert witnesses whose affidavits have been read to me clearly think) that this available sum cannot probably afford more than a dividend of some 6*s.* 8*d.*, or it may be 10*s.*, in the pound to creditors; and it is said that if this scheme is adopted—if this new bank is established—the illiquid assets can be gradually realized, and that the result will be that the creditors, if they do not get directly from the bank 20*s.* in the pound, will get annuities and deferred payments which will be saleable in the market, and which will eventually give them the equivalent of the remaining 13*s.* 4*d.*, or 10*s.* in the pound, as the case may be. I am not prepared to say, having regard to the facts and the decision in the case I have referred to, that the majority of creditors have not any right to impose this scheme upon the minority—that is to say, any right to insist upon the creditors giving up a portion of cash immediately payable to them with the view of obtaining a better realization and a larger ultimate payment. Therefore, I have come to the conclusion that I ought to approve this scheme.

C A
1893
In re English, Scottish, and Australian Chartered Bank
Vaughan Williams, J

I only wish to say further, that I have had a considerable doubt whether the information which was put before the meeting was information sufficient to enable them to deal properly with the matter. The one incident of the £900,000 debt due from two debtors, as to which the creditors apparently were so little regardful of their interests that they did not care to make any inquiries, is sufficient to shew how very uncertain the information was which was laid before the creditors. The statements made before me to-day go to shew that this uncertainty of statement, this unreliability of estimate of assets, is no new thing of to-day with this bank. It seems to have gone on for years, appearing, it may be honestly, but certainly appearing in the balance-sheets in a most misleading way, creating a fictitious reserve fund which had no existence whatever except on paper. I have considerable doubt whether I ought not to send back this scheme for reconsideration by the creditors with the fuller information; and that is a course which I should certainly have preferred here; but I am prevented from so doing because I feel that to postpone a scheme of this character is to defeat it. Under those circumstances, although I think that much more information could and ought to have been placed before the creditors, at the same time I cannot quite bring myself to refuse my sanction to this scheme.

But although I give my sanction to the scheme, it is only a provisional sanction; I shall make no final order, and I shall give no direction whatever to the Official Receiver as to handing over the assets of the old bank to the new bank, until I am satisfied as to the constitution of the new bank, as to its articles of association, and as to its corporate existence. Therefore, all that my decision on the petition amounts to to-day is this, that I am prepared to give effect to the scheme, when I have been satisfied as to the proper constitution and corporate existence of the new company, under conditions which are really suitable for carrying this scheme into effect.

F. E.

C A.

From this order the Scottish companies appealed. The appeal came on to be heard on the 12th of July, 1893.

BENGAL SECRETARIAT LIBRARY

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK.

Finlay, Q.C., *Beale*, Q.C., and *C. E. E. Jenkins*, for the Appellants:—

The *Joint Stock Companies Arrangement Act*, 1870, s. 2, gives power to a majority of creditors to bind a minority, but that is only a power to bind the dissentients by resolutions passed with a view to the benefit of the creditors as such. Here the company is solvent; so the creditors will not be benefited by the scheme. Then we say that the proxy papers were not neutral, as they ought to have been; they were "leading," they were filled up as proxies authorizing a special person therein named to vote "for" the scheme with a marginal note stating that if the creditor wished to vote against the scheme he must strike out "for" and substitute "against." Moreover, if the creditor wished to vote against the scheme and the marginal note were strictly followed, the paper would be made nonsense, for it would run, to vote "against the scheme with or without such modifications, &c." A voter who was not very intelligent would find it difficult to adapt the form. The proxy papers contain in substance a strong official recommendation to vote for the scheme, and are in violation of the 13th and 14th rules of the *Companies (Winding-up) Act*, 1890 (53 & 54 Vict. c. 63). Some of the proxies are bad under the *Stamp Act*, 1891, s. 80, because the time at which the meeting is to be held is not specified. As regards all the Australian proxies, a cablegram stating what proxies there are is an improper mode of voting. Such a proceeding obliges you to assume that the proxies are all good. The Australian creditors were not present in person or by proxy at the meeting, for the proxies are all at *Melbourne* or *Sydney*, and the chairman cannot test them as he ought to do.

[A. L. SMITH, L.J.:—Suppose only 100 votes wanted, and 6000 proxies are sent in?]

That will not do. The chairman must determine at the time whether the votes are good; he cannot go on the principle that out of 6000 proxies there must be at least 100 good ones. Sect. 80 of the *Stamp Act*, 1891, makes it necessary that the proxies should be produced. We submit that the Judge had no jurisdiction to allow voting by telegram. The proceedings

C. A
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK

in *Australia* shew that the voters there were not actuated by business considerations, but by what they call patriotic motives, and votes given from motives of that kind ought not to bind a minority who look at the matter on business grounds. *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1) does not lay down any such principle as Mr. Justice *Vaughan Williams* deduced from it. His Lordship puts the case on very much the same footing as an application for a new trial on the ground that the verdict is against the evidence—where a new trial is not to be granted unless the verdict is such as twelve reasonable men could not come to. The Court was not intended to confirm the scheme unless it was outrageously unreasonable, but to exercise its own judgment as to whether the scheme is reasonable, and its sanction was made necessary in order that an unreasonable scheme might not be forced on a dissentient minority. The scheme places the creditors in a worse position than they would be in under a winding-up, and is not a reasonable one. They get nothing but interest, and are in fact made annuitants where there are assets enough to pay them in full.

Latham, Q.C., and *Howard Wright*, for the Official Liquidator, took no part in the argument.

Sir *H. Davey*, Q.C., and *Whinney*, for a committee of creditors in favour of the scheme; and *Cozens-Hardy*, Q.C., and *Swinfen Eady*, for other creditors supporting the same view:—

The vast majority of the creditors approve of this scheme. The Appellants leave out of sight that the shareholders are English, the bulk of the creditors Australian. They also leave out of sight that one of the most valuable assets of the bank is the goodwill of the business, which may recover itself if freed from the immediate burden of creditors pressing for payment. The Appellants also leave out of sight that the bulk of the assets consists of property in *Australia*, which in the present state of things there could not be realized without a ruinous sacrifice. If this bank is not reconstructed probably the other

(1) [1891] 1 Ch. 213.

Australian banks which have stopped payment cannot be, and the Australian creditors are more likely to come to a sound conclusion as to the result of that than the English ones are. The result of a general failure to reconstruct would be to throw an enormous amount of property on the market. It has been urged that this is a scheme to enrich the shareholders at the expense of the creditors; but it is in fact a scheme to utilize the goodwill of the bank for the benefit of both. The creditors will get interest from the first. The scheme is stamped with honesty by its not containing what the Scotch creditors want—an undertaking to pay off the debts by a small number of instalments. The business could not be carried on with that undertaking—the credit of the bank would be gone—the Government of *Victoria* would probably no longer keep their account there. The dissentient creditors complain that they only get £4 per cent. instead of their money down; but there is reason to believe that the perpetual £4 per cent. would be worth £100 in the market, for public confidence in the bank is not wholly gone, and there is reason to believe that it may carry on business successfully. The dissentients assume that they can get 20*s.* in the pound—but when? A large portion of the assets consists of sheep-walks, and if everybody is wanting to sell sheep-walks and nobody has money to buy them, payment of the debts in full under a winding-up would be delayed indefinitely, if it ever took place at all.

With respect to the validity of the votes of the Australian creditors, there is nothing in the Act of 1862 or in that of 1870 to suggest that the written authorities are to be produced at the meeting. The "proxy" is the agent, not the written authority; and if the agent is properly appointed there is no necessity for proving his authority at the meeting. The written authorities are directed by the Act to be deposited at the office of the company. This was done in the present case: the authorities of the Scotch creditors were deposited at *Edinburgh*, and those of the Australian creditors at the principal cities there. They are deposited for the purpose of verification, and the Australian authorities could only be verified in *Australia*. It would be most unfair if the Australian creditors, who are the

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK

great majority of the whole body, were to be overridden by the English creditors; and, on the other hand, if the Court had waited for the Australian proxy papers to be sent to *England* the object of the scheme would have been frustrated. The form of the proxy papers was not misleading if read with ordinary intelligence, nor contrary to the 13th and 14th rules of the *Companies (Winding-up) Act*, 1890, which apply only to meetings summoned under sect. 6 of that Act. With respect to the *Stamp Act*, the objection is worthless, for the proxies might be made for no particular meeting and stamped with a 10s. stamp, and by sect. 15, sub-sect. 3, of the *Stamp Act*, 1891 (54 & 55 Vict. c. 39), such proxy, if executed out of *England*, may be stamped after it is sent to *England*. [They also referred to *Buckley* on the *Companies Acts* (1).]

Finlay, in reply.

LINDLEY, L.J.:—

This is an appeal from an order made by Mr. Justice *Vaughan Williams* which has not yet been drawn up, but which may be shortly stated to be the approval provisionally of a scheme for reconstructing this *English, Scottish, and Australian Chartered Bank*. I say provisionally, because, in the absence of the formal order, I must be guided by what I see in his judgment, in which he says: "I shall make no final order, and I shall give no direction whatever to the Official Receiver as to handing over the assets of the old bank to the new bank, until I am satisfied as to the constitution of the new bank, as to its articles of association, and as to its corporate existence. Therefore, all that my decision on the petition amounts to to-day is this, that I am prepared to give effect to the scheme, when I have been satisfied as to the proper constitution and corporate existence of the new company, under conditions which are really suitable for carrying this scheme into effect."

The Appellants in this case are creditors of the bank which I have mentioned to the extent of £92,000. They are Scotch companies who have advanced money by way of deposit to this

(1) 6th Ed. pp. 488, 631, 744, 752.

bank. The bank itself is a chartered bank; it is not registered under the *Companies Act*, 1862. It has a nominal capital of a million and a half; it has £900,000 paid up, and there is a reserve liability to the same amount. It stopped payment on the 12th of April last. A petition to wind it up was presented on the 13th of the same month; and on the 26th an order was made and a provisional liquidator was appointed. On the 18th of May an order was made for meetings to be held, and I will call attention to that presently.

The constitution of the bank is important. The bulk of the shareholders are English people—they are not Australians at all; and that is a matter which strikes me as extremely important in considering some of the objections which have been made to the votes of the Australian creditors. It has been represented that they have been induced by feelings of patriotism and a desire to support this bank and to reconstruct it and make a strong bank. That observation would have twice the force it has if these people were shareholders. But they are not: they are creditors.

The liabilities of this bank are stated very succinctly in the table which is attached to the petition. The main liabilities are on the deposit and current accounts, which come to nearly five million pounds. The assets are set down on the other side, and the main assets—the assets which have to be got in some way or other in order to pay these liabilities—are represented as bills receivable, loans, and advances against securities, £5,300,000. Now everything depends on the realization of those assets. The bank is represented to be solvent. The table which is before me shews that it is, and it shews further that there is a good margin of excess of assets over liabilities; and that if the assets could be realized there would be enough and more than enough to pay 20*s.* in the pound. Further, the affidavits shew that if these assets could be realized—I do not say now, but if times got better and the assets were realized and the creditors could wait—they might get their money in the long run. But the state of things is very anomalous in *Australia*. It is impossible to shut our eyes to the fact that this is not the only bank that stopped payment—I will not say broke, but stopped payment—and the consequence is that it is perfectly impossible at this present

C. A.
1893
In re English, Scottish, and Australian Chartered Bank.
Lindley, L.J.

moment to realize these assets at anything like 20*s.* in the pound. The assets consist of loans made on land, sheep-farms, and similar property. There is such an enormous quantity of that kind of property on the market, and there are so few purchasers of that property, that if it is brought on the market rapid realization is utterly hopeless.

Now, in considering this or any other scheme for paying creditors less than 20*s.* in the pound, it is absolutely necessary not only to look at the scheme, but to look at the other side. Where is the money to come from? We start with this, that the creditors ought to be paid 20*s.* in the pound. If it is there for them to have, they ought to have it at the expense of the shareholders; there is no question at all about that. But can they get it? If they cannot get it, then it becomes necessary to consider and decide upon some alternative scheme for giving them less than that to which they are entitled.

In this case I come to a conclusion upon the evidence upon two or three points which I think are perfectly plain. The first point is this. It is agreed on all hands, and there is no controversy about it, that anything like sudden realization, anything like a forced sale, would be utterly ruinous to the creditors. They would incur so large a loss that any reasonable alternative scheme would appear better than that to the great bulk of them. I think the evidence also shews that time may be usefully gained in one way, and one way only, and that is by keeping the bank going in some way or other. If you cannot keep the bank going, that alternative scheme of terminable payments will fall through. It will not be a practical scheme unless the bank is kept going. Having arrived at that, there then come the various methods of keeping the bank going, and the scheme before us is one. Whether it is the best one is another matter altogether. I shall say something more about that presently. But I do not think that it is just to say that this is a mere scheme to resuscitate the bank and not pay the creditors. If I thought that was the scheme, I should negative it without the slightest hesitation; but I think the true view of it is this, that it is a scheme for paying the creditors by resuscitating the bank, and I do not believe the creditors can

get paid in any other way. That is the result to my mind from the perusal and study of this evidence. Now, having arrived at that conclusion, I shall say no more about the so-called patriotism of the Australians. I dare say they are patriotic, but here they are creditors and nothing else. They are not shareholders. They care nothing about the bank except for the purpose of getting their money out of it, and although they take different views from the Scotch creditors and may be influenced, for anything I know, by a desire to keep the bank going, yet the object of keeping the bank going in their idea is to get their money, and beyond that there is no reason to suppose they care anything at all about the bank.

That being the broad conclusion from the facts, I come now to consider the objections which have been made to this scheme and to the function of the Court. The scheme has been carried by an enormous majority of creditors if they are all counted. But that is not enough. The *Joint Stock Companies Arrangement Act* of 1870 requires, not only that a scheme of this kind shall be passed by three-fourths of the creditors, but it requires something more. Sect. 2 says this: "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the *Companies Acts*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

Now the duty of the Court in acting upon that section has been

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK.
Lindley, L.J.

discussed and explained more than once, and I do not know that I can usefully add anything to what I said before, and to what my Brothers *Bowen* and *Fry* said before, in the case of *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (1). I adhere to what I said there, and I will read a short passage from my judgment (2): "What the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority have been acting *bonâ fide*. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bonâ fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it." Lord Justice *Fry* expressed himself to the same effect, in somewhat different language. He said (3): "Under what circumstances is the Court to sanction a resolution which has been passed approving of a compromise or arrangement? I shall not attempt to define what elements may enter into the consideration of the Court beyond this, that I do not doubt for a moment that the Court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith, and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the Court may take into consideration I will not attempt to forecast." Now, it

(1) [1891] 1 Ch. 213. (2) [1891] 1 Ch. 238.
(3) [1891] 1 Ch. 247.

is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the Court does not simply register the resolution come to by the creditors or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later.

While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage.

Having made these observations, I pass on to consider what the objections made to this scheme are. First of all, I will take the objections which I will refer to as technical—that is, the objections relating to the proxies. I have read from the statute words which shew that there must be three-fourths of the creditors present in person or by proxy. "Proxy" there means some agent properly appointed. Now, in this particular case the Australian creditors were present by the person whom they had, in fact, appointed. He was there. They were therefore present, not in person of course, but they were present by proxy. Then comes this difficulty, that the proxy papers—the authority empowering their agent to appear and vote for them—were not in this country. That particular difficulty was foreseen and so was provided for by that part of Mr. Justice *Vaughan Williams'* order to which I am about to refer. I do not mean the order appealed from, but the order convening the meeting. The position of affairs is peculiar. This bank had branches—in fact, main offices—in various places in *Australia, Sydney, Melbourne, Adelaide,* and

C. A.
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK.
Lindley, L.J.

Brisbane, and they had depositors, the great bulk of whom were Australians, and they had to be consulted as to what was to be done. Time was important, and Mr. Justice *Vaughan Williams*, in the order convening the meeting, put in this clause: "It is ordered that the service by post of the circular letter, with form of proxy and copy scheme, shall be deemed to be good service, as if the same had been posted and sent in the ordinary course of post seven days before the day appointed for the meeting." Then comes a special provision which is quite novel (I do not think any of us have seen it before) and which is extremely ingenious, and the question is whether the learned Judge exceeded his powers by putting it—"And it is ordered, that the creditors be at liberty to vote at the said meetings personally or by proxy, and that the creditors or contributories in *Australia* be at liberty to give proxies to persons to be designated for the purpose by the applicant"—that is, by the Official Receiver—"for or against the scheme, or to any other person entitled to vote at the meeting whom they may think proper, provided that such proxies be deposited at the office of the company in *Melbourne* or *Sydney* not later than three days prior to the holding of the meetings in *London*, and that particulars of the proxies so deposited be communicated by telegram to the Official Receiver for use at the said meetings."

Now, that is an entirely new form of order. I need hardly say that it is adapted to the necessities of the time—it is ingeniously using the improved methods of communication by telegraph, which it would be folly to shut out and not use if you can do it. The question is now whether the learned Judge had power to make such order. That turns upon the power conferred upon him by the statute under which he convenes meetings, and the most important section with reference to this particular point is sect. 91 of the *Companies Act* of 1862, coupled with the section of the Act of 1870, which I have already read. Sect. 91 of the Act of 1862 says this: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted

in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman," and so on. The Act of 1870, sect. 2, which has to be read with the Act I have just read, enables the Court, "in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct." And then it goes on with the provision about the majority which I have before referred to.

Now, it appears to me, under the authority of sect. 91 of the Act of 1862, this novel form of order is not beyond the power of the Judge. He had power to direct that these proxies should be filled up in *Australia*, that they should be deposited in the offices which are mentioned, and that the result of the proceedings might be acted upon in this country even before the proxy papers came over. I think it was within his power to do it, and, being within his power to do it, I do not hesitate to say it is a power with which we should not dream of interfering. That is what was done. Therefore, so far as that somewhat important point is concerned, it appears to me there was nothing irregular in the proceedings at this meeting.

But then it is argued that these Australian proxy papers and the votes given upon them ought all to be rejected because of the *Stamp Act*. Now, the *Stamp Act* which is in question is the *Stamp Act* of 1891 (54 & 55 Vict. c. 39), and the section relating to the powers of attorney and proxy papers is sect. 80. That must be construed with reference to the schedule which imposes the duties. I will read the schedule first: "Letter or Power of Attorney, and Commission, Factory, Mandate, or other instrument in the nature thereof. (1.) For the sole purpose of appointing or authorizing a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more . . . one penny." Then come some sub-clauses which are not important, and clause 6 is: "Of any kind whatsoever not hereinbefore described . . . 10 shillings." Now, reading sect. 80 we find that sub-sect. 1 enables you to use a proxy paper for one meeting with a penny stamp upon it, and then sub-sect. 2 says: "The

C. A.
1893
In re English, Scottish, and Australian Chartered Bank.
Lindley, L.J.

duty of one penny may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is executed"—that is, the person who is intending to vote by proxy—"and a letter or power of attorney or voting paper charged with the duty of one penny is not to be stamped after the execution thereof by any person." Therefore, if these were proxies requiring penny stamps they would be all bad. There being no penny stamp upon them, they having been signed without a stamp upon them, the Act is imperative that the duty of a penny is not to be stamped after the execution thereof by any person. Sub-sect. 3 runs on and makes it still plainer: "Every person who makes or executes, or votes, or attempts to vote, under or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall incur a fine of £50, and every vote given or tendered under the authority or by means of the letter or power of attorney or voting-paper, shall be void." Therefore it is quite plain that if it turned on the penny stamp section the whole of these proxies would be bad. It is said they do not turn on the penny stamp section, but they turn on the 10*s.* stamp section, and if so, then the objection fails. It seems to me that that is the true answer to this objection, bearing in mind that these proxies were not sent out with a penny stamp upon them; they might have been if there had been time, and then they would have been all right; but they are sent out without any stamp at all. They are instruments intended to be executed in a foreign country. The penny stamp not being applicable, they must have a 10*s.* stamp; but the moment you get out of the stringency of the penny stamp section you come within sect. 15, which relates to the stamping of instruments executed abroad. Sect. 15 says this: "Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof"—that does not apply to the penny stamp, because there is an express provision to the contrary; but it does apply to the 10*s.* stamp, as to which there is no express provision to the contrary. Then, passing on to sub-sect. 3 of sect. 15, "Provided, that save where other express provision is made by this Act in relation to any particular instrument;

(*a*) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the *United Kingdom*, may be stamped, at any time within thirty days after it has been first received in the *United Kingdom* on payment of the unpaid duty only." Therefore, it appears to me that the answer given to this stamp objection, which at one time looked a little formidable, is complete. Coupling that with the conclusion at which I have already arrived, that that particular clause in the order of Mr. Justice *Vaughan Williams* is not *ultrà vires*, it seems to me the objection to these proxy papers fails. It is not true that the Australian creditors were not present at this meeting by their proxy. Their "proxy"— that is to say, their agent appointed by them—was present. When you come to the proxy paper the difficulty is got over by the 10s. stamp, and the case does not fall within the penny stamp clause. That disposes of that objection.

I pass on now to consider the real substance of this matter. It is urged before us that the scheme was one which ought not to be forced on dissentient creditors. I have already read the Act and explained the duty of the Court to see that a dissentient minority is not unduly coerced. One must look now at this scheme, and, as I have already said, one must bear in mind the alternative. Bearing in mind the alternative to which I have already alluded, and to which I do not propose to allude again, can we say that this scheme is one which creditors cannot reasonably think to their advantage and the advantage of those who belong to the same class as themselves? That depends upon the scheme itself. Now, looking at the scheme, of course one sees objections to it. If I were a creditor I should see objections to it. I do not say I should not vote for it—probably I should; but that is not material. Every creditor who does not get his due would see objections to it if he could get more; but if he cannot get more, it is another thing. [His Lordship then considered the details of the scheme and the objections which had been made to it, and continued:—]

I do not hesitate to say that, forming the best judgment I can of this scheme, it has been honestly framed in the interests of the creditors, and, giving the Australian creditors all their due for

C. A
1893
In re English, Scottish, and Australian Chartered Bank.
Lindley, L.J.

patriotism, I fail to see that they have sacrificed their interests as creditors to any patriotism for the colony or for the bank. They see plainly enough that in the condition of affairs in the colony they cannot get their money unless they adopt some such scheme as this. Then it is said they have not had an opportunity of considering any other scheme which might be suggested. I do not think that is necessary. If you lay before creditors a scheme which they think is sufficient, I do not think it is the province of the Court to say that every conceivable scheme which the ingenuity of man can suggest was not laid before them and submitted to them. They are business men. They have looked at it, they know their own interest, and they have approved the scheme by a vast majority in favour of it. It appears to me that the learned Judge was perfectly right, that this scheme ought to be confirmed, and this appeal be dismissed with costs.

Lopes, L.J.:—

Two objections are taken to this scheme: the first is an objection to it on the merits; the second is a more technical objection, namely, that it has not been approved of by the statutory number of creditors. Now, this would be quite true if the English creditors alone were considered; but if the Australian creditors are counted as well as the English, there is no doubt the scheme would be carried by an overwhelming majority. What is contended is this, that the votes of the Australians ought not to be counted having regard to the mode in which those votes were obtained. That I will deal with presently.

Now the scheme of arrangement is a scheme under the Act of 1870, s. 2, and the material part of the section is this:—[His Lordship read a portion of the section.]

This enables a majority of creditors, provided there is a proper statutable number, to bind the dissentient minority. Now, the mode in which this power is to be exercised has, to my mind, been very well and correctly laid down in the *Alabama, &c., Railway Company's Case* (1), which has already been referred to. What I understand to be decided by that case is this, that it is not sufficient for the Court to ascertain that the statutory condi-

(1) [1891] 1 Ch. 213.

tions have been complied with; the Court must go further than that, and be satisfied that the statutable majority which are to bind the dissentient minority have acted *bonâ fide*, that they have not acted adversely to those whom they professed to represent, and, lastly, that the arrangement contemplated is a reasonable arrangement, such as that which a man of business would reasonably approve. With regard to the word "reasonably" it must always be borne in mind the word "reasonably" is a relative term: it means reasonably with regard to the particular circumstances of the case. What is reasonable in one case might be unreasonable in another. The reasonableness must be always regarded with reference to other alternatives. For instance, an arrangement giving a very small benefit to creditors, if the alternative were absolute ruin to the company and no benefit to the creditors, would I think be reasonable. In considering the scheme which is before us I am very much influenced by this.

The Australian creditors almost unanimously approve of this scheme. Who can better know the state of things in *Australia* than these Australian creditors? They are there upon the spot, they know all the details connected with the bank, they know all the circumstances which are likely to make the bank a flourishing concern or the contrary, and it appears to me that nobody in this country, or anywhere else except *Australia*, can express a view so cogent with regard to this matter as these Australian creditors. Really it does not stop there, because if evidence is of any value in this country, we have also a strong body of expert evidence obtained from stockbrokers in this country to the effect that they highly approve of the scheme, and they believe, having regard to all the circumstances of the case, that it is a scheme which will be most likely to end in a benefit to the creditors at large. Now, in these circumstances, I am unable to say this scheme is unreasonable. I think the learned Judge has come to a very proper conclusion in sanctioning this scheme.

Then as to the other objections with regard to the votes, although it is said these Australian votes ought not to be counted, the first question raised is whether the Judge had any power to make the order he did. No doubt it is a new form of

C. A.
1893
In re English, Scottish, and Australian Chartered Bank.
Lopes, L.J.

order, and I take it it is an order which would be made in very exceptional circumstances, such as the present. It appears to me, when you refer to sect. 91 of the *Companies Act* of 1862, it clearly authorizes that which the learned Judge has done. It is also to be borne in mind that the Act of 1870, under which the scheme is sanctioned, incorporates the Act of 1862; it is to be read with that Act. Now, the words of the 91st section of the *Companies Act* of 1862 are these: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes." That appears to me to confer upon the learned Judge power to do precisely that which he has done in these circumstances, and I think that what he has done is a proper and desirable thing, having regard to the circumstances. The object being to ascertain the wishes of the creditors both in *England* and elsewhere, it is a matter upon which I do not think anybody can have any doubt.

Then an objection has been taken which has been characterized as a stamp objection. That has been gone into at length by my Brother *Lindley*, and I have very little to say about it further than this, that if these proxy papers were stamped with a penny stamp in this country before they were executed, it appears to me that the votes could not have been sustained, and it appears to me these proxies would be bad. But there I think Mr. *Cozens-Hardy* has taken the case entirely out of the penny stamp section, because he brings them under sect. 15 as documents executed out of the *United Kingdom*, and within the schedule making them subject to a 10*s*. duty. It appears to me, therefore, that they are documents which may be stamped, after they have been used and executed, in the way I suppose these proxies will be stamped when they arrive in this country.

On the whole, therefore, I come to the conclusion that this appeal must be dismissed with costs. I think the order made by the learned Judge was a most proper and right one under the circumstances.

A. L. Smith, L.J.:—

I wish to add a few remarks upon a point which for the first time arises in this case, that is as to whether or not the electric telegraph can be made use of to carry out what was eminently needed, and indeed was absolutely necessary to do justice in this case. Now, in my judgment the answer to this depends in the main upon what power Mr. Justice *Vaughan Williams* had in this winding-up matter, because it must be admitted that he has not had before him the best evidence of these instruments of proxy, as I will call them. But what are the powers given to the learned Judge in winding-up matters? I turn to sect. 91 of the Act of 1862, and there is a phrase there which to me is very significant. It says: "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by"—what?—"by any sufficient evidence." Now, that is a phrase which is put in for the purpose of enlarging the powers of the Judge who has to adjudicate in these winding-up matters. It clearly abrogates the necessity of his acting upon strict legal evidence. That is quite clear. It allows him to act upon secondary evidence if he thinks fit; and it seems to me that it empowers the Judge in matters of winding-up, when he wants to ascertain what are the wishes of creditors or contributories, to act upon any evidence which he thinks sufficient for the purpose of arriving at the truth with regard to their wishes. That I apprehend to be the true meaning of these words, "by any sufficient evidence."

Now, what have we got next? We have next to turn to the section of the Act which provides how and in what way it is to be ascertained whether three-fourths in value of the creditors agree to the proposed scheme. That brings me to the Act of 1870. Sect. 2 of that Act has been read many times. I will not read it again; but the three-fourths are to be ascertained by the votes of the creditors "either in person or by proxy at such meeting." It will be noted that it is not stated "by an instrument of proxy." When you come to one or two sections in the other Acts, you will find a distinction which is drawn between an "instrument of proxy" and "a proxy," and it seems to me that it is manifest that that line in this section

C. A
1893
In re ENGLISH, SCOTTISH, AND AUSTRALIAN CHARTERED BANK
A. L. Smith, L.J.

"either in person or by proxy" means "either in person or by his lawfully constituted agent," and not by the instrument of proxy or the proxy paper. Now suppose—and I expect there is plenty of evidence in this case to support such a supposition, and no doubt Mr. Justice *Vaughan Williams* adopted it—suppose these Australian creditors, by a duly signed and deposited instrument of proxy in *Australia*, had delegated the authority to a Mr. *Smith* to go to this meeting in *London* and vote for them, where is there anything in the Acts to say that Mr. *Smith* must shew an instrument of proxy to satisfy the meeting or the Court afterwards that he is the duly authorized agent of the Australians? Mr. *Finlay* was unable to point to any statute that enacts the necessity for the agent to have the instrument of proxy with him. It seems to me it is not necessary in such a case as this for the instrument to be produced in order to enable a judge to decide whether the votes are to be counted or not; the Act enacts that he may act as regards ascertaining the wishes of the creditors upon any evidence which seems sufficient to him. The agent comes and says to the Judge, "I can assure you upon oath that I have these proxies, and that they are deposited in *Melbourne*." Why will not that do, assuming there is no reason to doubt its truth? Then, again, suppose there had been a letter written from *Melbourne*, why should not the letter be accepted if the Judge has no reason to doubt it and considers it sufficient? Then we come to the last point. Suppose a telegram is sent, and the Judge has no reason to doubt it and believes it, why should not he act upon it? Has he authority to act upon it? It seems to me he has.

It was to meet those points that this skilfully drawn order of Mr. Justice *Vaughan Williams* was made. He was in a difficulty about time, and every one was in a difficulty about time. In my judgment, he had jurisdiction to make that order, and therefore as a matter of law, if the Judge considered the evidence sufficient, and if he had no reason to doubt the truthfulness of it, as Mr. Justice *Vaughan Williams* had not, these votes were rightly counted and ought not to have been rejected.

Then it was urged by Mr. *Finlay* that even if this were so the *Stamp Act* would defeat these proxies, and he called our atten-

tion to the Act of 1891. But when that Act is accurately understood and when not only sect. 80 is read, but the schedule and sect. 15 are read, it is perfectly manifest that the true construction of that Act is that if you want to use a proxy for one meeting with a penny stamp, then you must affix the stamp and cancel it before it is used, and if you use it without that stamp being affixed and cancelled before it is used, you are liable to a penalty, and the vote is void. But if you do not want to use a penny stamp, but you want to use a form of proxy without a penny stamp for more meetings than one, then you may go under the schedule (I am only stating what is the purport of the Act) with a 10*s*. stamp, and if the document has been executed abroad without the 10*s*. stamp, you have thirty days after it reaches this country to stamp it. Therefore this objection about the penny stamp does not apply to this case, because these proxies when they get here can be stamped with a 10*s*. stamp within thirty days after their arrival. I would also point out that, on looking over the Act, I notice that although the 10*s*. stamp would be an enormous sum to pay in this case upon the voting papers, the exact number of which I forget, still there is a dispensing power, as you would expect to find, which the Government can apply and it need not exact the last farthing. Therefore it seems to me, as regards these points of law which were raised about the Australian votes that they both of them fail.

There was another point taken, that the instruments of proxy were bad because they had the name of the person who was to be agent in the papers themselves when they were sent out, and rules 13 and 14 of the Act of 1890 were referred to; but again Mr. *Cozens-Hardy* has satisfied me that they had no application to the case. Those rules refer to a perfectly different matter.

Then there is another point taken, that there was no special day named in the proxy paper. If it is a proxy paper to carry a 10*s*. stamp it is not necessary—so that objection also fails.

Then it was said it was a misleading document, and that it led the creditors in *Australia* to vote for the scheme when they otherwise would have voted against it. All I can say is, I cannot adopt that view. It is quite true that the paper is not

C. A.
1893
In re ENGLISH, SCOTTISH AND AUSTRALIAN CHARTERED BANK
A. L. Smith, L. J.

grammatical. If an Australian creditor struck out the "for" and put in "against," the last part of it would not make good sense, and if he wanted to be absolutely correct in his grammar he ought to have run his pen to the end of the clause; but to say that that proxy paper was misleading as printed, is to say what I cannot adopt.

Now I come to the judgment of Mr. Justice *Vaughan Williams*. I agree with him in the main, and therefore I am going to support him; but I must say I think he was hypercritical in the remarks he made on the judgment of this Court delivered by Lord Justice *Lindley*, Lord Justice *Bowen*, and Lord Justice *Fry*—for I declare on reading the judgment of the *Alabama, &c., Railway Company's Case* (1) I cannot conceive anything clearer than the judgment of the Lords Justices. In my opinion it is not open to the criticisms which Mr. Justice *Vaughan Williams* has subjected it to, and I think that Mr. Justice *Vaughan Williams* with a willing mind could have applied the law to this case perfectly easily.

A point was taken by Mr. *Finlay* and pressed upon us, viz., that in the scheme we are sanctioning there is no provision as in some of the other schemes whereby the existing shareholders were prevented from slipping out of their liabilities. If that is necessary, it seems to me, as Mr. Justice *Vaughan Williams* still has control over the scheme, he can insert it or have it inserted in the articles of association.

[His Lordship then made some other remarks on certain details of the scheme, and concluded by giving his decision that the appeal must be dismissed with costs.]

Solicitors: *Freshfields & Williams; Slaughter & May; Parker, Garrett & Co.; Murray, Hutchins & Co.*

(1) [1891] 1 Ch. 213.

M. W.

In re DAVERON. BOWEN *v.* CHURCHILL.

CHITTY, J.
1893
July 5, 6.

[1892 B. 1049.]

Will—Remoteness—Invalid Trust for Sale—Validity of Gift—Conversion—Real or Personal Estate—Right of Beneficiaries to Elect.

A testator devised a freehold house to trustees, subject to a lease which had forty-nine years unexpired, upon trust to pay the rent arising therefrom, so long as the lease should run, to certain named persons; and "upon the expiration of the lease" he directed that the freehold should be sold and the proceeds thereof distributed in thirds among certain other named persons, ascertainable within the limits of the perpetuity rule. The trust for sale being admitted to be void, as transgressing the perpetuity rule:—

Held, that notwithstanding the invalidity of the trust for sale the legatees of the proceeds of sale were entitled to the benefits intended for them by the testator, inasmuch as they had the right, in equity, to elect to take the property as real estate.

SPECIAL CASE.

James Daveron, who died in August, 1861, was at the date of his death seised in fee simple in possession of a public-house and hereditaments known as the *Eagle Tavern, East India Road, Poplar*, subject to an indenture of lease dated the 8th of May, 1860, whereby the said premises were demised by the said *James Daveron* to one *George Samuel Ayres* for a term of fifty years from the 24th of June, 1860, at a yearly rent of £70.

By his will, made in May, 1861, the said *James Daveron* gave all his real estate unto and to the use of his trustees, their heirs and assigns, upon trust to pay the ground-rent of £70 per annum arising from the said public-house "so long as the lease shall run" in certain proportions to certain named persons; and, "upon the expiration of the lease," he directed that the freehold should be sold, and the proceeds thereof distributed in thirds, among certain other named persons or their issue.

Questions having arisen between the beneficiaries, as to the persons entitled, under the will, to the *Eagle Tavern* and the proceeds of sale thereof, a special case was stated for the opinion of the Court.

CHITTY, J.
1893
In re DAVERON.
BOWEN v. CHURCHILL

It was admitted by counsel on behalf of the persons claiming the proceeds of sale, that the trust for sale was invalid as transgressing the rule against perpetuities: *Goodier* v. *Edmunds* (1); and the Court held, as a fact, that the persons entitled to receive the proceeds of sale were ascertainable within the period allowed by the perpetuity rule, so that the only question argued which calls for any detailed report was whether the invalidity of the trust for sale prevented the will from being effective in favour of the persons to whom the proceeds of sale were given.

Farwell, Q.C., and *Swinfen Eady*, for the persons claiming to be entitled to the proceeds of sale:—

First, we say that the persons to take the proceeds of sale can all be ascertained within the perpetuity rule.

Secondly, whether the trust for sale be, or be not, valid is immaterial, when the gift of the property is in no way made contingent on the validity of this trust.

The trust for sale is mere machinery, and does not in any way affect the substance of the gift. *Goodier* v. *Edmunds* (1) appears to be in favour of this contention also.

[They also referred to *Wood* v. *Drew* (2).]

Byrne, Q.C., and *J. Henderson*, for the heir-at-law of the testator:—

The persons who are to take these proceeds of sale cannot be ascertained within the limit of the perpetuity rules; but even if we fail in this contention, there is an intestacy, because the trust for sale is more than mere machinery—it is the essence of the will; the testator clearly intended this gift to be taken as personal and not as real estate, and to disregard this trust for sale, and give the land to the beneficiaries, as land, and not as money, is to make a new will. *Goodier* v. *Edmunds* is distinguishable, because in that case there was a gift of intermediate rents and profits until sale to practically the same persons as those in the gift of the proceeds of sale. Here the persons who take the ground-rent are not the same as the persons who are to take the proceeds of sale.

(1) Since reported, *post*, p. 455. (2) 33 Beav. 610.

Farwell, in reply:—

A gift of the proceeds of sale is, in equity, a gift of the estate to be sold; and even a person contingently entitled to the proceeds of sale of real estate may, pending the contingency, elect to take the estate as realty: *Meek* v. *Devenish* (1); *In re Potter* (2).

The trust for sale directed by the testator cannot be construed as declaring an intention that the property was to be converted for all purposes, so as to exclude the equitable right of the beneficiaries to elect to take it as real estate. Testators cannot be presumed to know this equitable rule in the same way that they are presumed to know the law: *Spread* v. *Morgan* (3).

R. Burleigh Muir, *Vernon R. Smith*, *A. J. Allen* and *Martelli*, for other beneficiaries, took no part in this argument.

CHITTY, J.:—

It is admitted that the trust for sale is void by reason of its having been directed to be made beyond the time allowed by the rule against perpetuities, and that admission appears to me to be correct, and to be in accordance with Mr. Justice *Stirling's* recent decision in *Goodier* v. *Edmunds* (4).

The questions for decision are two. The first is, whether the persons who are to take the proceeds of the sale, are persons who cannot be ascertained within the limits of the rule against perpetuities. If that question be answered in favour of the heir, there is no other question to be decided; but if it is not so answered, then there arises the question whether the trust for sale is to be looked upon as "mere machinery," as it has been called; or whether, as was put for the heir, it is the essence of the will.

The testator or his draftsman had a very simple case to deal with. The testator was entitled to the reversion in fee simple, of the *Eagle Tavern*, expectant upon a lease, which he had granted shortly before his will, the lease being for fifty years, of which forty-nine years had to run when he died. The existence of this lease seems to have occasioned the testator and

(1) 6 Ch. D. 566.
(2) 3 Times L. R. 420.
(3) 11 H. L. C. 588, 602.
(4) Since reported, *post*, p. 455.

CHITTY, J.

1893

In re DAVERON BOWEN *v.* CHURCHILL

his draftsman all the trouble that is to be found on the face of this will. The will contains a general devise to the use of trustees which carried the reversion in fee; and the trusts which he declared are, to pay this ground-rent of £70, so long as the lease shall run, in certain proportions and to certain persons. I need not go through that part of the will because there is no question in regard to the validity of this trust, as declared.

Then there comes, at the expiration or determination of the term, a trust for sale, and I propose now to examine very shortly the language of the testator with reference to the objects of his bounty who take through the medium of the trust for sale. [His Lordship then stated the terms of this gift, and held as a fact that the objects of the testator's bounty could all be ascertained within the limits required by the rule against perpetuities, and continued:—]

Now comes the question whether I can give effect to the testator's intention, seeing that he has directed a sale and his directions as to the sale are invalid. It is plain that the trust to sell and pay the proceeds to "*A.*" (a named person) confers an equity on "*A.*" and gives him the whole beneficial title which the testator is entitled to in fee simple. In equity "*A.*" is the beneficial owner, and "*A.*" can come to the trustees and say, "I desire you not to sell, but to convey the estate to me." About that there is no question. It is equally plain that if there is a direction to sell and to pay the proceeds in shares to *A.*, *B.*, and *C.*, then *A.*, *B.*, and *C.* are regarded, in equity, also as the owners of the estate. They can, by the doctrine of election, prevent any sale taking place, and, if they all express their intention, the trustees could lawfully convey the estate to them in the shares in which they are entitled to the purchase-money. The difference between the cases I have put of the proceeds going to one person or the proceeds going to several, consists in this: that where there are several they must all concur to stop the sale. I mention these points to shew how equity regards the substance of the matter, and considers those beneficially entitled to the purchase-money, as entitled to the estate itself.

One other observation is material in regard to this point, which is, that where there is a trust for sale—a valid one, of course—

and where there is no gift of intermediate rents, the persons who take the proceeds of the sale, being thus regarded as equitable owners of the estate, unquestionably take the rent for the period during which the sale is postponed.

Now, I am conscious that what I have stated with regard to the effect of a trust for sale, is not absolutely conclusive upon the point which I have to decide. But admitting that the question is one of considerable difficulty, it appears to me that, acting upon equitable principles, and looking to the substance of the thing, I am justified in holding that, though the trust for sale cannot take effect, the testator's intention can be carried into operation in favour of the objects of his bounty. I think it right to take the broader rather than the narrower view of the subject. I think the point made, on behalf of the heir-at-law, that the testator intended that the property should be taken in the shape of personalty, and not in the shape of realty, is insufficient to displace the conclusion at which I have arrived. The doctrine of election for the purpose of re-conversion, which proceeds on the footing of the equitable property in the thing being vested in those that take the proceeds of sale, shews that the Court does allow persons thus entitled to take the property as of a different quality to that which the testator intended. Or, to put it quite shortly, where the testator intended that several persons should take a gift in money, they may all concur in saying, "We will not take it in money, but we will take it in land."

I am of opinion, therefore, that though the trust for sale is void, there is a valid trust for the persons who were intended to take the proceeds of the sale, and with regard to whom there is no sufficient objection by reason of the rule against perpetuities.

The result, therefore, is, that the beneficiaries named in the will are entitled to take this property as real estate.

Solicitors: *Burgess & Cosens; Turner, Rodgers, & Myatt; A. A. Timbrell; C. T. Wilkinson.*

W. C. D.

CHITTY, J
1898
Aug 2

In re HEAD
HEAD *v.* HEAD.

[1892 H. 1924.]

Bankers—Depositors—Death of a Partner—Fresh Deposit Note—Liability of Deceased Partner's Estate—Novation.

The acceptance by a customer, from the surviving partner, of a fresh deposit note for the balance of a debt due from a firm, one of whose partners is dead, is not sufficient evidence of novation to discharge the estate of the deceased partner.

GEORGE HEAD, the testator, whose estate was being administered in this action, died on the 10th of December, 1890. At the time of his death he was a partner in the *Edenbridge Bank*, the firm then consisting of himself and his son, *George Searle Head.*

In March, 1890, Mrs. *Ellen E. L. Reynolds*, a customer of the bank, deposited with the firm a sum of £1400, at interest at 3½ per cent., for which she received in the usual course a deposit receipt. In July, 1891, Mrs. *Reynolds* withdrew £300; in November she withdrew £100; and on the 14th of December she withdrew a further sum of £150, and on this occasion she surrendered the deposit receipt for £1400, which was cancelled, and received a new deposit receipt for £850.

After the death of the testator the *Edenbridge Bank* was carried on by *G. S. Head*, the surviving partner alone. Mrs. *Reynolds* was aware of the death of *George Head*, the testator, and continued to receive interest on the balance of her deposit until the bank suspended payment in 1892.

When a customer paid in money to a deposit account, the bank gave a receipt or deposit note in the following form:—

"Received of the sum of £

"For *G. & G. S. Head.*

(Signature of cashier.)

"This deposit receipt bears interest at 3½ per cent. per annum, if left undisturbed for six months.

"It is repayable only after three months' notice."

When a customer drew out any portion of the deposit, the old deposit note was usually given up and cancelled, and a new deposit note, precisely in the same form, for the amount then standing to his credit, was given; and these notes, both before and after the death of the testator, and down to the stoppage of the bank, were signed, "For *G. & G. S. Head.*"

The assets of the bank being insufficient, and *G. S. Head* having been adjudicated a bankrupt, Mrs. *Reynolds* now claimed the right to prove in the administration action, against the estate of the testator, for the amount remaining due to her on the deposit receipt of the 14th of December, 1891. There being several other holders of deposit receipts, who made a similar claim, her case was adjourned into Court to be argued as a test case.

Byrne, Q.C., and *Methold*, for the Claimant:—

The acceptance of a fresh deposit receipt, is no novation of contract. The original liability for the balance of the deposit still remained, though it was the custom of the bank, as a matter of convenience, to give a fresh deposit note or receipt for the actual amount of the balance left in the hands of the firm. What was done does not amount to an express agreement to discharge the estate of the deceased partner, and accept the liability of the surviving partner; neither can any discharge be inferred from the facts or the conduct of the parties: *Harris* v. *Farwell* (1). Under the circumstances, the estate of the testator is still liable to us for this £850.

Levett, Q.C., and *H. Wace*, for the trustee in bankruptcy of *G. S. Head*:—

It is a mere question of evidence. Is there or is there not any evidence of any intention on the part of the Claimant to discharge the old firm? We say there is none.

Whitehorne, Q.C., and *R. F. Norton*, for the legal personal representative of the testator, *G. Head*:—

The Claimant is bound by the date of the instrument under

(1) 15 Beav. 31.

CHITTY, J. 1893 In re HEAD HEAD v. HEAD

which she claims; she holds only a deposit receipt from the new firm of *G. S. Head.* There has been a complete novation and a substitution of a new debtor in the place of the old. This case is distinguishable from *Harris* v. *Farwell* (1), because in that case the original documents were not given up to be cancelled, and no new receipts were taken. The Claimant has accepted interest from *G. S. Head,* she has received back part of her deposit from him, and she has also taken a fresh deposit note for what was left of the old debt. Such conduct is a good defence by way of accord and satisfaction: *Thompson* v. *Percival* (2).

[CHITTY, J.:—In that case the creditor was informed by the continuing partner that he must look to him for the debt, as the retiring partner knew nothing about it.]

The case of *Bilborough* v. *Holmes* (3) seems to be somewhat in our favour.

[CHITTY, J.:—In that case two new members were brought in, and a new liability was in express terms substituted for the original liability.]

On the facts of this case we submit that it can be inferred that the Claimant intended to accept the liability of the continuing partner, and to discharge the old firm.

CHITTY, J.:—

The question I have to decide is one of novation. It appears that Mrs. *Reynolds,* one of the customers of the *Edenbridge Bank,* left £1400 on deposit with the original firm of *G.* and *G. S. Head,* for which she received a deposit receipt in the usual form. After the death of *George Head,* in December, 1890, the business of the bank was carried on by *G. S. Head* alone. Mrs. *Reynolds* was aware of this fact, and on several subsequent occasions she seems to have withdrawn some of her money, on one of them, viz., the 14th of December, 1891, receiving a fresh deposit note for the balance of £850 in precisely similar terms with her old deposit note, except that the amount due was £850 instead of £1400. On this it has been argued that there has been a novation, or, in

(1) 15 Beav. 31. (2) 5 B. & Ad. 925, 932, 933.
(3) 5 Ch. D. 255.

other words, that there has been an agreement on the part of Mrs. *Reynolds* to discharge her original debtor *G. Head* and accept the liability of *G. S. Head* alone in substitution for the joint liability of *G.* and *G. S. Head.* The giving of a fresh deposit note to a customer who withdraws any part of his deposit seems to have been only a convenient, and very usual, way of writing off a part of the debt due from the bank; but it is not sufficient evidence of novation to discharge the original debtor from liability.

In my opinion there never was any intention on the part of Mrs. *Reynolds* to get rid of or discharge her original debtor, and accept the liability of the son alone. The result, therefore, is that her claim to prove against the estate of the deceased partner *G. Head* for that £850 balance must be allowed.

Solicitors: *Emmet, Son, Stubbs, & Melhuish,* agents for *F. C. Gates, Worthing; Linklater & Co.; Clarke & Calkin.*

W. C. D.

NORTH, J.

1893

July 29.

In re PEAKE'S SETTLED ESTATES.

[1893 P. 0121]

Settled Estate—Will—Trust for Sale—Exclusion of Statutory Power of Sale—"Express Declaration"—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 38.

A testator by his will created a trust for sale of estates which he thereby settled for the benefit of his wife and children. And he stated that it was his earnest desire that his mineral lands should remain in his family for a considerable number of years, so that they might enjoy the benefit to be derived from the development thereof. And he expressed his will to be, that the trust for sale should not be exercised, in so far as it related to his mineral lands, until after the decease of the survivor of his present sons and daughters.

The sons and daughters mentioned in the will being still living, a petition was presented under the *Settled Estates Act*, 1877, asking that the trustees for the time being of the will might be authorized to sell the whole or any part of the settled estates. There were minerals under parts of the estates. The trustees of the will were two ladies, one of whom was a widow, and the other was unmarried. They joined in the petition:—

Held, that the direction contained in the will was not, within the meaning of sect. 38 of the *Settled Estates Act*, 1877, an "express declaration" that the powers conferred by the Act should not be exercised, and that, notwithstanding that direction, the Court had power under the Act to authorize the trustees to sell the estates.

But the Court refused to confer the authority upon two ladies, and the petition was ordered to stand over with a view to the appointment of other trustees.

PETITION under the *Settled Estates Act*, 1877, and the *Settled Land Acts*, 1882 to 1890, asking that the present trustees, or other the trustees for the time being of the will, dated the 6th of October, 1877, of *Thomas Peake*, who died on the 23rd of April, 1881, might be authorized to sell for cash, or to grant at fee farm rents, the whole, or any portion or portions, of an estate called the *Tileries* estate, and other lands, devised by the will of the testator, with power from time to time to make proposals for separate sales, and with power also, subject to the approval of the Court in each case, to lay out any part or parts of the same estate and lands for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses. The present trustees of the will were

two ladies, one of whom was a widow, and the other was a spinster. The petition was presented by some of the beneficiaries and the two trustees, and was served upon another beneficiary, who was an infant. There were minerals under the *Tileries* estate.

By his will the testator devised his estates to trustees, upon trust for sale, and to hold the proceeds of sale upon the trusts therein declared for the benefit of his wife and children and their issue in succession. Power was given to the trustees in their or his uncontrolled discretion, so long as they or he should think fit so to do, to postpone the sale of the estates. The will contained the following clause: "Whereas I have by great labour and exertion and large expenditure acquired certain valuable mineral lands forming part of my estate, and it is my earnest wish and desire that the same shall remain in my family for a considerable number of years, so that they may enjoy the benefit to be derived from the development thereof, Now I hereby express my will to be that the trusts for sale contained in my will shall not be exercised, in so far as they relate to my said mineral lands and estate, until after the decease of the survivor of my present sons and daughters."

The sons and daughters thus referred to were still living.

Tyssen, for the Petitioners:—

The direction contained in the will only restricts the exercise of the trusts for sale contained in the will; it is not an "express declaration," within the meaning of sect. 38 of the *Settled Estates Act*, 1877 (1), that the powers conferred by the Act shall not be exercised: *In re Williams' Settled Estates* (2).

R. F. Norton, for the Respondent.

(1) By sect. 38: "The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended."

(2) W. N. (1878) 189.

NORTH, J. 1893 *In re* PEAKE'S SETTLED ESTATES

NORTH, J.:—

Having regard to the manner in which the clause in the will is expressed, I do not think it prevents the Court from authorizing the sale of the estates by the trustees. But I decline to confer the authority upon two ladies.

Tyssen:—We may be able to appoint other trustees.

NORTH, J.:—

I will order the petition to stand over generally, with liberty to amend.

The evidence intended to shew that it was desirable to sell the estates was not read to the Court.

Solicitors: *Cronin, Orgill, & Cronin; Field, Roscoe & Co.*

W. L. C.

NORTH, J 1893 *Aug* 8.

MANITOBA AND NORTH-WEST LAND CORPORATION *v.* ALLAN.

[1893 M. 1726.]

Practice—Service out of the Jurisdiction—Notice of Motion—Rules of Supreme Court, 1883, *Order* XI., *r.* 1; *Order* LII., *r.* 9.

Unconditional appearance to a writ served out of the jurisdiction is submission to the jurisdiction as to the whole claim, though part of it is outside Order XI., rule 1.

On motion to discharge an order giving leave to serve a writ out of the jurisdiction (part of the claim only being within Order XI., rule 1), the order was allowed to stand; but it was ordered that the Plaintiffs should not be entitled to relief on the part of the claim outside Order XI., rule 1.

Semble, the Court cannot allow notice of motion for an injunction to be served outside the jurisdiction with the writ.

AN agreement dated February, 1890, was made between the *Manitoba and North-Western Railway Company of Canada*, a Canadian company incorporated by the Legislature of the Dominion of *Canada* (hereafter called the *Railway Company*) of one part, and the *Manitoba and North-West Land Corporation*,

Limited, an English company incorporated by registration (hereafter called the *Land Corporation*) of the other part. The agreement provided that the *Land Corporation* should purchase from the *Railway Company* 352,000 acres of land at the price of two dollars an acre, to be paid with interest from the 15th of May, 1889, by annual instalments down to the 15th of May, 1893, and a final payment to be made on the 31st of December, 1894; that the *Railway Company* should act as agent to the *Land Corporation* for the sale of the land to settlers at a commission. It was stipulated that, if in any year the sales by the *Railway Company* did not amount to a minimum quantity of land sold at an average minimum price, the *Land Corporation* were to be allowed a rebate on their purchase-money of the difference between the amount of minimum fixed and the amount produced by the actual sales, to be deducted from the next instalment payable by the *Land Corporation*, and that the *Railway Company* should be entitled to no commission in respect of the sales effected by them in that year. The 19th article of the agreement was: "The particulars of all sales made by the *Railway Company* shall be furnished by them to the *Land Corporation* monthly."

The instalments of purchase-money had been duly paid by the *Land Corporation*. The *Railway Company* had delivered certain land warrants entitling bearer to select a specified amount of land out of land reserved by the Government of the Canadian Dominion for the *Railway Company*. It was the practice of the *Land Corporation*, on receiving the accounts of sales made by the *Railway Company*, to hand land warrants in proportion to *H. M. Allan*, vice-president and director of the *Railway Company*, who undertook to place the warrants in trust, to be delivered to the purchasers as they became entitled thereto.

Accounts had been delivered by the *Railway Company* of sales for the years ending the 15th of April, 1890, and the 15th of April, 1891, shewing that sales had been effected during each of those years up to the minimum amount stipulated for, and the accounts between the two companies were settled for those years on the footing of no rebate being allowed to the *Land Corporation*,

NORTH, J.

1893

MANITOBA AND NORTH-WEST LAND CORPORATION v ALLAN

and commission being allowed to the *Railway Company*, and eighty-one land warrants were handed to *H. M. Allan*.

The *Land Corporation* alleged that they had recently discovered that some of the sales appearing in the accounts delivered by the *Railway Company* were bogus sales, and that fifty-three of the land warrants delivered to *H. M. Allan* had not been placed in trust, but were in the possession of *H. M. Allan* or the *Railway Company*, who claimed the right to use them for their own purposes.

The *Land Corporation* in June, 1893, commenced this action against *H. M. Allan*, as sole Defendant, claiming an injunction to restrain him from parting with fifty-three land warrants. The Defendant *Allan* was served in this country with the writ; he made an affidavit for the purpose of resisting a motion for injunction, to the effect that the *Railway Company* claimed to be entitled to the land warrants in question, and had given him notice not to part with them.

By an order in Chambers, made on the 3rd of July, 1893, by Mr. Justice *North*, the Plaintiffs were given liberty to amend their writ by adding the *Railway Company* as Defendants, and claiming an account of all transactions between the *Railway Company* and the Plaintiff *Land Corporation*, under the agreement of February, 1890, and payment of what should be found due to the Plaintiff corporation on taking such account, and it was ordered that a concurrent writ should be issued, that the Plaintiffs should be at liberty to serve the Defendant company with the writ in *Canada*, and give notice of motion for an injunction with the writ. The writ was accordingly amended, and a concurrent writ was issued, and served on the Defendants with notice of motion for an injunction. The Defendant *Railway Company* now moved to discharge the order of the 3rd of July, 1893.

The motion for an injunction was not brought on till a subsequent day.

Cozens-Hardy Q.C., and *G. P. C. Lawrence*, for the motion:—

The order is wrong because there is no power to serve a notice of motion out of the jurisdiction. Order LII., rule 9, allowing

service of notice with the writ in ordinary cases, does not apply to service of a concurrent writ or notice of a writ out of the jurisdiction: *Young* v. *Brassey* (1).

This is not a case for allowing service out of the jurisdiction at all; the only two heads (if any) of Order XI., rule 1, within which any part of this action can be brought are (*e*) and (*g*). The former provides for bringing an action on a contract to be performed within the jurisdiction; the contract stated here does not come within that rule: *Rein* v. *Stein* (2).

The action does not come within head (*g*), which provides for service on a party out of the jurisdiction where an action has been properly brought and duly served upon a person within the jurisdiction. The fact that the Plaintiffs have been able to catch within the jurisdiction a person party to a small part of the action is not sufficient to found jurisdiction: *Indigo Company* v. *Ogilvy* (3).

The Court has discretion to refuse to give leave to serve out of the jurisdiction. This is a case in which the Court will refuse to exercise that discretion, and thereby to bring the *Railway Company* away from its own forum: *Cresswell* v. *Parker* (4); *Société Générale de Paris* v. *Dreyfus* (5).

If the Court adopts the construction of the rule most favourable to the Plaintiffs' contention, the claim asks relief much beyond any relief for which the Defendant *Railway Company* can be brought here: they must not be brought here upon that; if they put in an appearance to the writ as it stands, they may be said hereafter to have submitted to the jurisdiction. For that reason the order for service out of the jurisdiction ought to be set aside.

Swinfen Eady, Q.C., and *W. F. Hamilton*, for the Plaintiff corporation:—

It is quite clear on the contract that an account was to be delivered to the Plaintiffs in this country. The contract has been broken in that respect; therefore, on that ground the writ

(1) 1 Ch. D. 277.
(2) [1892] 1 Q. B. 753.
(3) [1891] 2 Ch. 31.
(4) 11 Ch. D. 601.
(5) 37 Ch. D. 215.

NORTH, J
1893
MANITOBA AND NORTH-WEST LAND CORPORATION v. ALLAN

is one proper for service out of the jurisdiction: *Thompson* v. *Palmer* (1).

The Defendant *Allan* was properly served in this country with the writ in the action—then only an action for an injunction. On his affidavit it has turned out that the other Defendants are alleged to be necessary parties. The action is, therefore, on this ground, within Order LII., rule 9.

If part of the relief asked against the Defendant company is not the subject of an action in this country, that is no reason for quashing the order; that defence can be set up, if a good one, hereafter.

There is no limitation to rule 9 of Order LII.; therefore the Court can give leave to serve notice of motion for an injunction with the writ in all cases, including cases where service has to be made out of the jurisdiction.

NORTH, J.:—

I think that there must be some modification of the order sought to be discharged. I think Mr. *Cozens-Hardy* is quite right in saying that if he appears to the action generally he will have submitted to the jurisdiction on the whole claim.

[His Lordship stated the facts, and held that the claim for an injunction was within Order XI., rule 1 (*g*), and the claim for an account of sales was within rule 1 (*e*) of that Order, but that the claim for payment was not within the rules, and, therefore, leave to serve the writ was improperly given so far as related to that part of the claim, and proceeded:—]

When the summons for leave to amend and serve out of the jurisdiction was before me in Chambers, it occurred to me that allowing a writ to be served abroad which asked for something in excess of relief that was properly within the rule could do no harm. I think that was too hasty a view, because I think the Defendant company is entitled now to say that, if he enters an unqualified appearance to the writ, that the account of dealings under the contract ought to be general.

Therefore, what I propose to do in respect of this part of the case is to allow the writ to stand as it is, but to make an order

(1) [1893] 2 Q. B. 80.

that the Plaintiffs are not to be entitled to any relief under the claim with respect to sales of land beyond getting from the Defendant company a true and proper account of all sales.

I think the proper course as to costs is to make the Plaintiffs' costs costs in the action. I will reserve the Defendants' costs till the trial, that I may see whether any costs ought to be allowed to them.

With respect to service of the notice of motion with the writ, I think the order allowing that was made *per incuriam*. I do not think the meaning of the Orders is to allow service of notice of motion on a party out of the jurisdiction until an appearance has been entered. Whatever the effect of the Orders may be as to that will be dealt with when the motion comes on (1).

Solicitors for Defendant *Railway Company: Norton, Rose, Norton & Co.*

Solicitors for Plaintiffs: *Ashurst, Morris, Crisp & Co.*

D. P.

BARTLETT *v.* WEST METROPOLITAN TRAMWAYS COMPANY.

NORTH, J.
1893
Aug. 9.

[1893 B. 2878.]

Public Undertaking—Statutory Company—Mortgage Debentures—Receiver and Manager.

A receiver and manager was appointed of the undertaking of a tramways company.

Gardner v. *London, Chatham and Dover Railway Company* (2) distinguished.

THIS was an action by the holders of overdue mortgage debentures of the Defendant company on behalf of themselves and all other debenture-holders. The Defendant company were incorporated by an Act of Parliament passed in the year 1882. The mortgage debentures were issued in conformity with powers

(1) Before the motion for an injunction came on the Defendant *Railway Company* had entered an appearance, and the objection that leave ought not to have been given to serve notice with the writ was withdrawn.

(2) Law Rep. 2 Ch. 201.

NORTH, J.
1893
BARTLETT v. WEST METROPOLITAN TRAMWAYS COMPANY

contained in the Act, each debenture in terms assigned to the person named in the debenture, "his executors, administrators, and assigns, the undertaking, and all tolls, and sums of money arising by virtue of the said Act," to hold until the principal advanced and interest should be repaid.

A motion was now made on behalf of the Plaintiffs, in pursuance of part of the claim, for the appointment of a receiver and manager of the property and undertaking of the Defendant company comprised in the debentures, and also to manage the tramways, and generally to carry out the undertaking and business of the company comprised in the mortgage debentures.

Cozens-Hardy, Q.C., and *Gregson*, for the Plaintiffs:—

There are many precedents for the appointment of a manager of a tramway company: such an order was made in *Hope* v. *Croydon and Norwood Tramways Company* (4th Feb., 1887) (1), in this branch of the Court; in the *City of London Contract Corporation* v. *Coventry District Tramways Company* (26th Feb., 1892, C. 711), before Mr. Justice *Chitty*; and in *Marshall* v. *South Staffordshire Tramway Company* (5th May, 1893, M. 1156), before Mr. Justice *Kekewich*.

Hastings, Q.C., and *Rowden*, for the Plaintiff in another debenture-holder's action.

Brice, Q.C., and *Vernon R. Smith*, for the Defendants:—

There is no difference in principle between appointing a manager of such an undertaking as a tramway and such an undertaking as a railway. In each case the public nature of the undertaking is a bar to the appointment of a manager. The only way the debenture-holders can enforce payment is by getting a receiver appointed: *Gardner* v. *London, Chatham and Dover Railway Company* (2). A manager will not be appointed of a business at the instance of a mortgagee unless the business is in express terms included in the mortgage: *Whitley* v. *Challis* (3).

(1) See 34 Ch. D. 731. (2) Law Rep. 2 Ch. 201.
(3) [1892] 1 Ch. 64.

Cozens-Hardy, in reply:—

A tramways company differs from a railway company in that a railway company cannot be wound up by the Court, while a tramways company can.

NORTH, J.:—

I will appoint a receiver and manager. There are several cases in which a manager of a tramway undertaking has been appointed. The case is quite distinguishable from *Gardner* v. *London, Chatham and Dover Railway Company* (1), a case where the Court had no power to wind up the company. Here the Court has power to wind up the Defendant company.

Aug. 10. The Defendant company appealed. On appeal an order was made by consent dismissing the appeal; the Plaintiffs' costs to be costs in the action.

Solicitors for Plaintiffs: *William Webb & Co.*
Solicitor for Defendant company: *Hugh Godfray.*
Solicitor for Plaintiff in the other action: *Wharton.*

D. P.

HAYNES *v.* KING.

NORTH, J
1893
Aug. 10.

[1893 H. 2675.]

Light—Prescription—Reservation in Lease of Right to Obstruct Light—"Adjoining or Contiguous"—Covenantee—"Assign"—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

The Plaintiffs were lessees, under four leases, dated the 17th of February, 1870, from the Ecclesiastical Commissioners, for a term of sixty years from the 25th of December, 1867, of four houses on the south side of a street in *London*. The street was thirty-one feet wide. At the date of the leases there were on the north side of the street, opposite to the Plaintiffs' houses, four old houses, also belonging to the Commissioners, which were thirty and a half feet in height. The Plaintiffs' houses were nearly forty-four feet in height. Each of the Plaintiffs' leases contained a declaration that "notwithstanding anything herein contained, the

(1) Law Rep. 2 Ch. 201.

NORTH, J
1893
HAYNES
v.
KING

lessors shall have power, without obtaining any consent from, or making any compensation to, the lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect, or suffer to be erected, on such adjoining or contiguous premises, any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee, or the tenants or occupiers of the hereditaments hereby demised." The leases provided that "the word 'lessors' shall be taken to mean and include the Ecclesiastical Commissioners, their successors and assigns, and other the reversioner or reversioners for the time being of the premises, so far as the same will admit, unless the context or nature of the case may require a different construction."

From the date of the leases, until the building by the Defendant which is about to be stated, a period of more than twenty years, no alteration was made in the houses opposite the Plaintiffs' houses. On the 19th of July, 1892, an agreement was entered into between the Commissioners and the Defendant, by which, in consideration of his pulling down and rebuilding the four old houses opposite to the Plaintiffs' houses, in accordance with plans to be approved by the Commissioners, they agreed to grant to the Defendant leases of the sites of the old houses and the buildings to be erected thereon. In pursuance of this agreement the Defendant pulled down the old houses, and was, with the approval of the Commissioners, building new ones, which had already reached a height of fifty-three and a half feet, and were intended to be, when completed, about five or six feet higher. It was admitted that the new buildings would obstruct the Plaintiffs' light:—

Held, (1.) that the above clause in the Plaintiffs' leases prevented them from acquiring a right to light under sect. 3 of the *Prescription Act*; (2.) that the Plaintiffs' leases and the Defendant's agreement respectively passed by implication the subsoil of the street, *usque ad medium filum viæ* (subject to the rights of the local authority in the surface of the street), and that therefore the Defendant's premises were "adjoining or contiguous" to those of the Plaintiffs; (3.) that the Defendant was an "assign" of the benefit of the agreement between the Commissioners and the Plaintiffs:—

Held, therefore, that the Defendant was entitled to build so as to obstruct the Plaintiffs' lights.

Mitchell v. *Cantrill* (1) distinguished.

MOTION by the Plaintiffs for an injunction to restrain the Defendant, until the trial of the action or further order, from erecting, or proceeding with the erection of, any building on any part of a piece of land situate on the north side of *Leonard Street, City Road*, opposite to the messuages and premises known

(1) 37 Ch. D. 56.

as Nos. 8, 10, 12, and 14, *Leonard Street*, of which the Plaintiffs were lessees, so as to darken, injure, or obstruct any of the ancient lights or windows of the Plaintiffs' said messuages and premises, as such lights and windows were enjoyed previously to the taking down of the buildings which previously stood on the above-mentioned piece of land.

It was admitted that the buildings which the Defendant was erecting, or about to erect, would obstruct the Plaintiffs' ancient lights, and the right of the Plaintiffs to an injunction depended upon the construction of the leases under which they claimed.

The Plaintiffs were the trustees of the will of *William Haynes*, deceased. The four houses, respectively known as Nos. 8, 10, 12, and 14, *Leonard Street*, were formerly respectively known as Nos. 4, 5, 6, and 7, *Tabernacle Row*, and they were respectively demised to *William Haynes* by the Ecclesiastical Commissioners by four leases, respectively dated the 17th of February, 1870, for the term of sixty years from the 25th of December, 1867. The lease of the house No. 4, *Tabernacle Row*, described the demised property as "All that piece or parcel of ground, with the messuage or tenement thereon erected, situate and being No. 4 on the south side of *Tabernacle Row*, which said premises, with the dimensions and abuttals thereof, are more particularly described in the ground plan thereof drawn in the margin of these presents, and therein coloured red, together with all the appurtenances whatsoever to the premises belonging." The ground plan in the margin of the lease shewed the demised premises as abutting on the north side thereof upon *Tabernacle Row*, and as being fifty-six feet in depth from the north to the south side thereof. The lease contained covenants by the lessee with the lessors (*inter alia*) that the lessee "shall not nor will by building or otherwise stop or obstruct any light belonging to any premises the estate or interest whereof in possession or reversion now is, or hereafter may be, in the said lessors or in any persons in trust for them. . . . and that no act matter or thing whatsoever shall at any time during the said term be done which may be or tend to the annoyance, nuisance, or damage of the lessors, or the lessees or occupiers of any of their houses in the neighbourhood." And it was thereby declared

NORTH, J.
1893
HAYNES v KING

that, "notwithstanding anything herein contained, the said lessors shall have power, without obtaining any consent from or making any compensation to the said lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect or suffer to be erected on such adjoining or contiguous premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee or the tenants or occupiers of the hereditaments hereby demised." And it was thereby lastly declared that "the word 'lessors' shall be taken to mean and include the said Ecclesiastical Commissioners, their successors and assigns, and other the reversioner or reversioners for the time being of the said premises, so far as the same will admit, unless the context or nature of the case may require a different construction."

The leases of the other three houses were in precisely similar terms.

On the 19th of July, 1892, an agreement was entered into between the Ecclesiastical Commissioners and the Defendant, by which it was witnessed that, in consideration of the costs and expenses to be incurred by the Defendant in and about the performance of the stipulations on his part thereinafter contained, the Commissioners (therein called the lessors) thereby agreed that, on the receipt of a certificate from the lessors' surveyors that the buildings agreed to be erected or rebuilt respectively as thereinafter mentioned had been erected, rebuilt, and completed upon one or more of the several pieces of land to the satisfaction of the surveyors, the lessors would grant, and the Defendant thereby agreed to accept, a lease or leases of such of the said several pieces of land upon which the buildings should have been completed to the satisfaction of the surveyors as aforesaid, together with all the appurtenances thereto belonging, for the term or terms and at the rents respectively set forth in a schedule to the agreement.

Among the premises comprised in this agreement were four houses, known respectively as Nos. 9, 11, 13, and 15, *Leonard Street*, and situate on the north side of the street and immediately

opposite to the Plaintiffs' four houses. The Defendant thereby agreed with the lessors (*inter alia*), that he would forthwith remove the buildings then standing on the several pieces of land thereby agreed to be demised; that he would erect upon each of the several pieces of land such a number and such description of new buildings as might be required by the surveyors in accordance with plans, &c., to be prepared by the Defendant, and to be previously approved in writing by the surveyors; that he would, in the meantime and until the leases should have been granted pursuant to the agreement therein contained, observe, fulfil, and perform all and every the covenants, conditions, stipulations, and agreements therein, or in the draft form of lease thereinafter mentioned, contained on the part of the Defendant, in like manner as he would be bound to do if a lease or leases in such form had been actually granted and executed, and the counterpart or counterparts thereof had been duly executed by him. It was further agreed that the lessors should have power, without obtaining any consent from or making any compensation to the Defendant, to deal as they might think fit with any land adjoining or near to the premises thereby agreed to be demised, and to erect or suffer to be erected, on such adjoining or neighbouring land, any buildings whatsoever, whether such buildings should or should not affect or diminish the air or light which might then, or at any time during the term thereby agreed to be granted, be enjoyed by the lessees, tenants, or occupiers of the premises thereby agreed to be demised.

The draft form of lease referred to in this agreement contained stipulations similar to those which were contained in the leases granted to the Plaintiffs, and in particular, it contained a covenant by the lessee with the lessors that he would not "by building or otherwise stop or obstruct any light belonging to any premises, the estate or interest whereof in possession or reversion may be in the lessors, or in any person in trust for them," and also a covenant "that the lessors shall have power at any time, without obtaining any consent from or making any compensation to the lessee, his executors or assigns, to deal as they may think fit with any of the premises adjoining or near to

NORTH, J
1893
HAYNES
v
KING

the hereditaments hereby demised, and to erect or suffer to be erected on such adjoining or neighbouring premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee, his executors, administrators, or assigns, or other the tenants or occupiers of the hereditaments hereby demised."

The Defendant had pulled down the four old houses, and was, with the approval of the Commissioners' surveyors, and in accordance with the terms of his agreement, building new houses on the land. The height of the Plaintiffs' houses was forty-three feet ten inches. The height of the old houses which formerly stood on the Defendant's ground was thirty feet six inches. The new houses which the Defendant was erecting had, at the time of the commencement of the action, reached the height of fifty-three feet six inches; but they were not completed, and there was evidence that, when they were completed, they would be about five or six feet higher. The extreme width of *Leonard Street* was thirty-one feet.

Cozens-Hardy, Q.C., and *G. Cave*, for the Plaintiffs:—

The clause in the Plaintiffs' leases which authorizes the Commissioners to build in any way they may think fit on "adjoining or contiguous" premises (assuming that the Defendant's premises are "adjoining or contiguous" to those of the Plaintiffs) is only an authority to do so "notwithstanding anything herein contained." The clause only prevents its being said that the Commissioners would be derogating from their own grant by building or permitting building in such a way as to obstruct the Plaintiffs' light at any time before the expiration of twenty years from the date of the lease. It does not prevent the Plaintiffs from acquiring a right to light under sect. 3 of the *Prescription Act* (1)

(1) Sect. 3. "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

by twenty years' uninterrupted enjoyment *Frewen* v. *Philipps* (1); *Mitchell* v. *Cantrill* (2). The latter case exactly applies to the present.

Swinfen Eady, Q.C., and *Eastwick*, for the Defendant:—

The object and effect of the clause is to prevent the lessee from acquiring a right to light under the *Prescription Act* or in any other way. It renders the Plaintiffs' enjoyment of light one by "agreement expressly made by deed" within sect. 3 of the Act.

Mitchell v. *Cantrill* is distinguishable. There there was only an exception out of the lessor's grant; here there is a grant by the lessee to the lessors of the right to build in any way they please on their other land. It is the very case which Lord Justice *Cotton* had in his mind when in *Mitchell* v. *Cantrill* (3) he said: "If you had an express provision in the contract between the parties that, notwithstanding the grant to the plaintiff, the landlord should be at liberty to build so as to interfere with his right, that would be another point."

Cozens-Hardy, in reply:—

The argument for the Defendant gives no effect to the words "notwithstanding anything herein contained." The Plaintiffs have acquired a statutory right by twenty years' enjoyment.

NORTH, J.:—

In my opinion Mr. *Swinfen Eady's* construction of the deed is the better one, and I think the case is covered by the observations of Lord Justice *Cotton* in *Mitchell* v. *Cantrill*. He there said: "If you had an express proviso in the contract between the parties that, notwithstanding the grant to the plaintiff, the landlord should be at liberty to build so as to interfere with his right, that would be another point." That, as it seems to me, is the effect of the declaration in the present case. There is, no doubt, a grant of the house, which, if there were nothing to modify it, would pass the right to enjoy all the light

(1) 11 C. B (N.S.) 449. (2) 37 Ch. D. 56.
(3) 37 Ch. D. 60.

NORTH, J.
1893
HAYNES v. KING.

coming to the windows. But then this clause says: "The lessors shall have power, without obtaining any consent from or making any compensation to the said lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect, or suffer to be erected, on such adjoining or contiguous premises, any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee or the tenants or occupiers of the hereditaments hereby demised." It seems to me that that is an express provision that the enjoyment of light by the lessee under the grant of the house is to exist only until the lessors shall require to exercise the right expressly given to them by the contract contained in the clause which I have just read.

Mr. *Cozens-Hardy* relies on the words "notwithstanding anything herein contained." I cannot see that the insertion of those words carries the matter any further. Under the lease the lessee would have had by the grant the right to light, but, notwithstanding that, there is an express bargain that the right shall not prevent the lessors from building as they please.

Cozens-Hardy, Q.C., and *G. Cave*, for the Plaintiffs:—

The Defendant's premises are not "adjoining or contiguous" to those of the Plaintiffs. "Contiguous" means the same thing as "adjoining." It means "in contact with." The Defendant's premises, being on the opposite side of the street, do not touch those of the Plaintiffs. The street is within the *Metropolis Local Management Act*, and the surface of the street and the soil for some distance below the surface is vested in the vestry or district board.

[NORTH, J.:—Did not the subsoil of the street (below that which vests in the local authority) pass to the Plaintiffs by their lease *usque ad medium filum viæ*, and had not the agreement with the Defendant a similar operation, so that the Plaintiffs' and the Defendant's premises are really in contact? *Berridge* v. *Ward* (1); *Micklethwait* v. *Newlay Bridge Company* (2).]

(1) 10 C. B. (N.S.) 400. (2) 33 Ch. D. 133.

The dimensions of the demised property are strictly defined in the Plaintiffs' lease, and they do not include the subsoil of the street. There cannot be such an implied grant when the surface of the street is vested in the local authority.

Moreover, the Defendant is not entitled to the benefit of the agreement between the Plaintiffs and the Commissioners. The agreement gives the "lessors" power to build so as to obstruct the Plaintiffs' light. The word "lessors" is to be taken to "mean and include the Ecclesiastical Commissioners, their successors and assigns, and other the reversioner or reversioners for the time being of the said premises." The Defendant is not an "assign" of the Plaintiffs' agreement with the Commissioners: *Renals* v. *Cowlishaw* (1). That case was expressly approved by the House of Lords in *Spicer* v. *Martin* (2).

[NORTH, J., referred to *Everett* v. *Remington* (3).]

Swinfen Eady, Q.C., and *Eastwick*, for the Defendant, were called upon only as to the latter point:—

Renals v. *Cowlishaw* is distinguishable. The Defendant is claiming as "assign" of the benefit of the agreement. The bargain is that the Commissioners may "erect or suffer to be erected" buildings which will obstruct the Plaintiffs' light. The Commissioners have agreed with the Defendant that he shall erect the buildings which he is now erecting, and he is erecting them under the superintendence of the Commissioners' surveyor, and with their sanction. They could only authorize this by virtue of their agreement with the Plaintiffs.

Cozens-Hardy, in reply:—

The draft lease, by the covenants in which the Defendant is now bound, contains an express covenant by him not to build so as to "obstruct any light belonging to any premises the estate or interest whereof in possession or reversion may be in the lessors."

(1) 9 Ch. D. 125. (2) 14 App. Cas. 12, 24.
(3) [1892] 3 Ch. 148.

NORTH, J.

1893

HAYNES v. KING

NORTH, J.:—

The first question to be decided is, What is the meaning of the phrase, "Any of the premises adjoining or contiguous to the hereditaments hereby demised"? I think the word "contiguous" was used there by some one who did not fully understand its meaning. I do not think it was intended to have its strict meaning, viz. "touching," because the phrase is "such adjoining or contiguous premises," and I think the two words, "adjoining" and "contiguous," were not intended to be merely synonymous, but were meant to be alternative, and that the meaning really was "such adjoining or neighbouring premises." But even if the word is to be construed strictly, still I think the Plaintiffs' and the Defendant's premises are "adjoining or contiguous." They are situate on opposite sides of the street, and the words of the lease in the one case, and of the agreement in the other, are quite sufficient to pass the soil *ad medium filum viæ*. I think that is quite clear. I need not refer to any other authority on this point than the observations of Lord Justice *Cotton* in *Micklethwait* v. *Newlay Bridge Company* (1). In my opinion the Defendant's houses on the opposite side of the street, belonging to the same lessors, are premises adjoining or contiguous to the Plaintiffs' premises. And I think it would be very strange indeed if the lessors had been stipulating as to their own property on the same side of the street, a building on which would not be likely to interfere with the access of light to the adjoining or neighbouring houses, and should at the same time have left entirely out of consideration their own land on the opposite side of the street, a building on which might directly affect the access of light to the demised premises.

The other point is, Who are the persons who are entitled to the benefit of the covenant? It is agreed that the word "lessors" in the lease shall be taken to mean and include the Ecclesiastical Commissioners, their successors and assigns, and other the reversioner or reversioners for the time being of the said premises, so far as the same will admit, unless the context or nature of the case may require a different construction." The phrase is, "shall mean and include." If the phrase had been

(1) 33 Ch. D. 133.

"shall include" so and so, it is clear it would not have been exhaustive. The words are "shall mean and include," which is a wider phrase no doubt; but then the words follow, "so far as the same will admit, unless the context or nature of the lease may require a different construction." Now, the covenant as to building is, that the lessors shall have power to deal as they may think fit with any of the premises "adjoining or contiguous" to the demised premises, "and to erect or suffer to be erected on such adjoining or contiguous premises any buildings whatsoever." It provides not only for what the Commissioners may erect themselves, but also for what they may suffer to be erected on the neighbouring premises.

It is in evidence that the Commissioners have expressly bargained with the Defendant that he is to erect upon the premises to be leased to him the very buildings which are now being erected. Therefore, what he is doing is not merely by the sufferance of the Commissioners, but is in pursuance of the express words of a contract with them requiring that he shall do it. But Mr. *Cozens-Hardy* says that the Defendant derives title under an agreement for a lease to be executed in a specified form, and that that form contains a covenant (which must be taken to have been binding from the date of the agreement) which requires the lessee not to do the very thing which he has contracted with the Commissioners to do. I do not think there is really any difficulty in that. Whichever comes first—whether the agreement is to operate first and afterwards the lease when it is executed, or whether the lease is to be taken to have been in operation from the first by force of the agreement—it is clear that the bargain between the Commissioners and the Defendant is that he is to erect these buildings which he is now erecting, and, if the covenant contained in the lease not to build so as to obstruct light is at this moment binding upon the Defendant, except so far as it has been released, the express bargain made at the same time shews that, though he entered into such a covenant, the building of these houses in accordance with his stipulation with the lessors was not to be taken to be a breach of the covenant according to its true construction.

NORTH, J.
1893
HAYNES
v.
KING.

In my opinion, the bargain between the Plaintiffs and the Commissioners authorizes that which has been since done, and is now being done, by the Defendant. The Plaintiffs have no ground for complaint, and the motion must be refused.

Solicitors: *Pontifex, Hewitt, & Pitt; Potter, Sandford, & Kilvington.*

W. L. C.

NORTH, J
1893
Aug 11

In re FAIRBAIRN ENGINEERING COMPANY.

LADD'S CASE.

Voluntary Winding-up—Enforcement of Calls—Powers of Directors—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133, *sub-s.* 5; *s.* 139.

A general meeting of a company in voluntary liquidation has power to elect directors and sanction the exercise by them of powers of enforcing payment of calls by sale or forfeiture of shares

IN the year 1875 a special resolution was passed to wind up the *Fairbairn Engineering Company, Limited*; voluntary liquidators were appointed, and the list of contributories was settled in that year. Two calls had been made by the present liquidators—one of 10*s.* a share on the 16th of December, 1890, the other of 5*s.* 6*d.* a share on the 18th of October, 1892. This was a motion on the part of the liquidators under sect. 138 of the *Companies Act*, 1862. The Respondent was the executor of *Louisa Gascoigne Ladd*, the holder of shares on which nothing had been paid on account of the calls. He was made Respondent as representative of other contributories. There were no longer directors of the company.

The notice of motion asked that it might be determined whether the liquidators or the company could, with or without the consent of any other person or persons, exercise the powers by the articles of association of the company given to the board of directors of the said company of selling and forfeiting for the benefit of the company any and what shares of the company, or whether the board of directors of the company could now with the consent of the liquidators or of a general meeting of the

company exercise such powers of selling and forfeiting, and particularly whether the shares registered in the name of *Louisa Gascoigne Ladd* were liable to be so sold or forfeited.

Of the company's articles of association, article 42 provided that the board of directors might decline to register the transfer of shares belonging to persons indebted to the company and should have a lien enforceable by sale of such shares on non-payment of any such debt for two months after demand. Articles 46, 48, and 49 were as follows:—

"46. After three months' non-payment of any call in respect of any share the board may declare the share to be forfeited for the benefit of the company."

"48. The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in and all claims and demands against the company in respect of the share and all other rights incident to the share; but any member whose shares shall have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture.

"49. Forfeited shares may be sold or absolutely extinguished by the board as they shall deem most advantageous to the company."

Cozens-Hardy, Q.C., and *Coltman*, for the Applicants:—

The directors can, under sect. 133, sub-sect. 5, of the *Companies Act*, 1862, notwithstanding the voluntary winding-up, exercise any powers they had before the winding-up, if the continuance of such powers is sanctioned by the liquidators or a general meeting. And the liquidators can call a meeting of the company under sect. 139 to elect directors.

Swinfen Eady, Q.C., and *Boome*, for the Respondent:—

The true construction of sect. 133, sub-sect. 5, is that the powers of the directors cease on the appointment of liquidators, unless at that time or previously the continuance of the powers shall have been sanctioned. The status of a shareholder at the

NORTH, J. 1893 LADD'S CASE.

commencement of the winding-up cannot be altered: *Companies Act*, 1862, s. 131; *Daues' Case* (1).

NORTH, J.:—

I think these powers of the directors can still be exercised. It is a long time, no doubt, since the commencement of the winding-up of the company—eighteen years. It is only recently that calls have been made, why I do not know. In many cases they have not been paid in full, in some cases not at all. In this case, no doubt selected as a representative case, nothing has been paid on the calls.

The question is, whether shares can now be sold or forfeited under the articles of the company. If there were no voluntary winding-up, and the company were still going on with its business, it is quite clear that the directors could have sold the shares under article 42, or forfeited them under article 48. The question is whether the fact that the company is being wound up voluntarily makes any difference. I think it does in manner, but not in substance. Sect. 131, one of that group of sections commencing at sect. 129 under the head "Voluntary winding-up of the company," provides that "the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of this company taking place after the commencement of such winding-up shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up." Now, it seems to me that, amongst the corporate powers of the company are the powers to be exercised by the directors as well as the powers to be exercised by general meetings of shareholders. Both sets of powers are corporate powers, though they have to be exercised in different modes. Then we come to sect. 133, which provides that the consequences enumerated in the various sub-sections shall ensue upon a volun-

(1) Law Rep. 6 Eq. 232.

tary winding-up. The only material sub-section is No. 5, which says: "Upon the appointment of liquidators all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers." Mr. *Swinfen Eady*, as I understand, reads that clause as not applying to the time when the liquidator has been appointed; he says that the clause is important, and has effect in this way, that when the resolutions for the winding-up have been passed, but a liquidator is not appointed till a subsequent date, sanction to the exercise by the directors of their powers may be given; but that, when once a liquidator has been appointed, such sanction cannot be given. Now, the sanction may be given by the liquidator, and he cannot act at the very moment he is appointed; but he must have some time to look round; therefore, if the powers of the directors are to continue by some act of the liquidator, that must be by some act done by him after his appointment has actually taken place. If the liquidator can give the sanction after the time when he has been appointed, I do not see why the company in general meeting cannot also sanction the continuance of the directors' powers. It is quite clear that powers of general meetings do continue long after the appointment of liquidators. That is made clear by sect. 139, which says: "Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding-up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or extraordinary resolution, or for any other purposes they think fit." And if the winding-up lasts more than a year, "the liquidators shall summon a general meeting of the company" at the end of each year during the winding-up.

It seems to me, therefore, that the contention, that the latter words of sect. 183, sub-sect. 5, providing that the powers of directors are all to cease unless some step is taken once for all to continue the powers of the directors or the powers of the company, is not a well-founded argument. I think a general meeting can be summoned at any time, which I think, amongst other things, would have power to elect directors and sanction their enforcing

NORTH, J
1893
LADD'S CASE

calls under the articles. What I think should be done here is, at the next general meeting, or at a meeting to be called for that purpose, to appoint directors for the purpose of considering whether the payment of calls should be enforced either by the sale or forfeiture of shares.

MINUTES OF ORDER.—This Court doth declare that a general meeting, to be held pursuant to sect. 139 of the *Companies Act*, 1862, has power to appoint directors of the company and to sanction the exercise by them of the powers of enforcing calls, and selling, transferring, and forfeiting shares, contained in the articles of association of the said company.

Solicitors for liquidator: *Cunliffes & Davenport.*
Solicitor for Respondent: *W. M. Willcocks.*

D. P.

GOODIER *v.* EDMUNDS.

STIRLING, J.

1893

April 26, *May* 19.

[1891 G. 2233.]

Will—Remoteness—Invalid Trust for Sale of Realty—Good Gift of Proceeds and Rents till Sale—Conversion—Share of Proceeds, whether Real or Personal Estate.

A trust for sale cannot, in equity, convert real into personal estate unless it is absolute and effective.

For the purposes of the rule against perpetuities, there is no difference between a trust for sale and a power of sale where the sale is intended to be completed by a conveyance to the purchaser of the legal estate vested in the trustees.

A trust for sale contained in a will was void as offending the rule against perpetuities, but the trusts of the property and the rents and profits thereof until sale were good, and the interests of the beneficiaries did not fail:—

Held, that the real and not the personal representatives of a deceased beneficiary were entitled to the proceeds of a sale of the real estate made under the order of the Court.

The *dictum* of *Jessel*, M.R., in *Goodier* v. *Johnson* (1), adopted.

JACOB GOODIER, who died in June, 1842, by his will dated the 22nd of November, 1837, gave and devised to trustees all his real estate upon certain trusts during the lives of his daughter *Mary Beech*, his son *William Goodier*, and any wife of his said son who might survive him, and from and after the death of the longest liver of his said daughter, his said son, and any widow of the said son upon trust to sell; and as to the money to be raised by such sale and the rents and profits to arise from the property until sale to pay and apply the same unto and equally amongst all and every the child and children of his son *William* and his daughter *Mary*, share and share alike and the lawful issue of such of them as might be then dead leaving issue, such issue to be entitled to no more than their parent, or respective parents would have been if living.

The testator went on to provide that if the son then living of his daughter *Mary Beech* should die without leaving lawful issue, or leaving issue all of them should die under age and unmarried,

(1) 18 Ch. D. 441.

STIRLING, J.

1893

GOODIER v. EDMUNDS

then the trustees should pay the share of money which would have been payable to him, under the aforesaid trusts, to the children of the testator's son *Joseph*. He further provided that if his son *William* should happen to die without leaving any lawful issue, or leaving any, all of them should die under age and unmarried, then the trustees should pay the share which would have been payable to the children of *William* under the trusts aforesaid to the children of *Joseph* and *Mary*.

The testator's will had already been considered, and its true construction to a large extent determined by the Court of Appeal in *Goodier* v. *Johnson* [1876 G. 242] (1), by whom it was held, in July, 1881, that the gift in favour of the children of *William Goodier* and *Mary Beech* was not a gift to their children living at the period of distribution and the issue of such of them as should be then dead, but a gift to all their children, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue. And the late Master of the Rolls said that the trust for sale was bad, but that the trusts of the property, and the rents and profits thereof till sale for the persons to whom the proceeds of the sale were bequeathed, was a good trust, and carried the property to them.

The state of the testator's family was as follows:

His daughter *Mary Beech* died on the 7th of July, 1855, having had two children only; one of these children died in infancy before the date of the testator's will. Her other child, *Joseph Henry Beech*, who was born in the testator's lifetime, died on the 20th of August, 1886, leaving issue one child, the Defendant *Anne Edgerley Beech*, and having by his will, dated in May, 1875, appointed his wife *Sarah Beech* and *William Richards* his executors.

The testator's son *William Goodier* died in January, 1867, leaving his widow, *Elizabeth Goodier*, him surviving. He had twelve children, four of whom died in infancy. The other eight attained twenty-one, and of these three were now living, viz. (1.) *Jane Goodier*, who was born on the 7th of October, 1841; (2.) *Mary Ann Sophia Yacovleff*, who was born on the 9th of September, 1845, and had two daughters living; and (3.) the

(1) 18 Ch. D. 441.

Plaintiff *Nicholas Goodier*, who was born on the 26th of June, 1849. All the five remaining children of *William Goodier* (four of whom were born in the testator's lifetime), were dead, leaving issue.

Elizabeth Goodier, the widow of *William Goodier*, died on the 16th of August, 1891, and on the 30th of October, 1891, *Nicholas Goodier* brought this action against *William Edmunds*, the surviving trustee of the will of *Jacob Goodier*, and the Defendant *Anne Edgerley Beech*, claiming a sale of the real estate devised by the will of *Jacob Goodier*, other than a portion which had been sold, and distribution of the proceeds thereof among the parties interested.

With the exception of the Plaintiff and the Defendant *Anne Edgerley Beech*, all the children and issue of *Jacob Goodier* were resident out of the *United Kingdom*.

Under orders made in this action, the real estate of *Jacob Goodier*, which was situated in the County Palatine of *Lancaster*, had been sold, and the proceeds were now about to be distributed. *Joseph Henry Beech* having died in the interval between the deaths of *Jacob Goodier* and *Elizabeth Goodier*, this summons was taken out by the Plaintiff *Nicholas Goodier*, for the determination (*inter alia*) of the questions whether the direction or trust for sale of the real estate devised by the will of *Jacob Goodier*, was void for remoteness, and whether *Joseph Henry Beech's* share in the proceeds of *Jacob Goodier's* real estate ought to be regarded as realty or personalty.

The summons were served upon the Defendants *William Edmunds* and *Anne Edgerley Beech*, and upon *Sarah Beech* as the surviving executor of the will of *Joseph Henry Beech*. Some of the persons interested in the proceeds of *Jacob Goodier's* real estate were aliens born before the *Naturalization Act*, 1870, and in the view that if such proceeds were realty, the Duchy of *Lancaster* might have some claim to their shares, the summons was also served upon the Attorney-General for the Duchy.]

By order, dated the 27th of February, 1893, the Plaintiff was appointed to represent the other living grandchildren of the testator, and the estates of the grandchildren who died without leaving issue; *Sarah Beech* was appointed to represent the

STIRLING, J. 1893 GOODIER v. EDMUNDS

estates of the grandchildren who had died leaving issue; and *Anne Edgerley Beech* was appointed to represent the great grandchildren of the testator.

Hastings, Q.C., and *De Morgan*, for the Plaintiff, in support of the summons.

Buckley, Q.C., and *Yardley*, for *Anne Edgerley Beech*:—

The trust for sale in the will of *Jacob Goodier* is void for remoteness. The Master of the Rolls, in his judgment in *Goodier* v. *Johnson* (1), said: "It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after." Then there is no conversion, and the moneys arising from the sale of the realty must be treated as realty. The rule is that a testator cannot control property beyond a certain limited period, and here the testator's will cannot intervene for the purpose of turning realty into personalty after a period beyond the rule against perpetuities: *In re Cotton's Trustees and the School Board for London* (2).

It can make no difference in principle whether the sale is effected by means of a trust or a power; and the share of *Joseph Henry Beech* must be treated as real estate devolving upon his heiress-at-law: *Ware* v. *Polhill* (3); *Hale* v. *Pew* (4); *Sugden* on Powers (5); *Jarman* on Wills (6).

B. B. Rogers, for *Sarah Beech*:—

Here the proceeds of the real estate absolutely vested in the beneficiaries within the period allowed by the rule; and neither *Ware* v. *Polhill* nor *Hale* v. *Pew* apply. In the former case the whole disposition was bad. In the latter it was a power and not a trust. A power cannot be exercised after the property has absolutely vested. If there had been merely a power to sell it would have been bad; but a trust for sale cannot be bad when the proceeds are divisible amongst a class ascertained within the limits. It was not decided in *Goodier* v. *Johnson* that the trust

(1) 18 Ch. D. 446–447.
(2) 19 Ch. D. 624.
(3) 11 Ves. 257.
(4) 25 Beav. 335.
(5) 8th Ed. pp. 846, 847.
(6) 5th Ed. vol. i. p. 261.

for sale was invalid, and the observations of the Master of the Rolls, which have been referred to, are mere *obiter dicta*, and ought not to be followed. I contend that the share of *Joseph Henry Beech* ought to go to his legal personal representatives.

Whitaker, for the Attorney-General of the Duchy of *Lancaster*:—

It appears that all the aliens interested, whether born before or after the *Naturalization Act*, 1870, are either children or grandchildren of natural-born subjects, and I accordingly take no part in the argument.

Macnaghten, for the Defendant *William Edmunds*.

1893. May 19. STIRLING, J.:—

The question which I have to decide in this case is whether one of the beneficiaries under the will dated the 22nd of November, 1837, of the testator, *Jacob Goodier*, took the interest thereby conferred on him as realty or personalty.

The will has already been considered, and its true construction to a large extent determined by the Court of Appeal in *Goodier* v. *Johnson* (1), where it was held that the gift in favour of the children of *William Goodier* and *Mary Beech* was not void for remoteness.

Since the decision of the Court of Appeal, the last survivor of the three persons to whom life interests were given has died. In the interval between the death of the testator and that of such last survivor, the son of *Mary Beech* (one of the three) has died: his real and personal estate go in different directions, and it has become necessary to ascertain whether his share in the proceeds of sale of the testator's real estate is to be regarded as realty or as personalty. On this point Sir *G. Jessel*, M.R., said this (2): "We must therefore read the clause as making a gift to all the children, but if any die before the period of distribution leaving issue, then there is a gift over to such issue. The result is that there is a gift to a class who must be ascertainable within the prescribed period subject to gifts over of the shares in certain

(1) 18 Ch. D. 441. (2) 18 Ch. D. 446.

STIRLING, J.

1893

GOODIER v. EDMUNDS

events, and if any of those gifts over are invalid, the original gift of those shares remains unaffected. It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after. But there is a trust of the property, and the rents and profits thereof until sale, for the persons to whom the proceeds of the sale are bequeathed, and if the trust for sale is bad, still that trust is good, and will carry the property to them." These observations were not dissented from or commented on by either of the other members of the Court (viz., the present Master of the Rolls and Lord Justice *Cotton*), and are relied upon by those interested in the real estate of the deceased child. On the other hand it is said that they are in the nature of *obiter dicta*, unnecessary for the decision of the question then before the Court, and ought not to be followed. It is contended that the rule against perpetuities is simply concerned with the vesting of estates, and that its requirements are satisfied, when (as in the present case) both the legal estate and the equitable interests necessarily vest within the proper limits. With the exception of the passage just quoted, there was not cited in argument nor have I been able to discover any authority bearing on the question. I have found some difficulty in satisfying myself how far Sir *G. Jessel's* observations were meant to extend, and also as to what is the correct view of the law on the point. The conclusions at which I have arrived are these.

The rule against perpetuities (as is well shewn by the case of *London and South Western Railway Company* v. *Gomm* (1)) prohibits the creation of estates or interests (whether legal or equitable) which may not arise until after the period defined by the rule. A power of sale which is to come into operation at some epoch beyond that period offends against the rule, because it would enable the donee of the power to vest in a purchaser an estate in fee simple after the expiration of the prescribed period. This is obvious where the power is intended to operate under the *Statute of Uses* by the revocation of existing, and the creation of new uses; and the like reason appears to hold where the fee simple is vested in trustees, and the power is to be executed by

(1) 20 Ch. D. 562.

a conveyance of that estate; as for example, where there is a trust to divide between the members of a class, and the trustees are empowered to sell for the purpose of making the division: see *Peters* v. *Lewes and East Grinstead Railway Company* (1). It was, therefore, rightly admitted at the bar that if in the present case there had been a power instead of a trust for sale, that power would have been invalid. There is, however, no substantial difference, for the purpose of the rule against perpetuities, between a trust for sale and a power of sale, where the sale is intended to be completed by a conveyance to the purchaser of the legal estate vested in the trustees. A testator or settlor cannot (as I think) impose an obligation to sell where he cannot lawfully confer a power to do so; or escape from the rule against perpetuities by vesting in his trustees an imperative instead of a discretionary power of sale. I therefore come to the same conclusion as the late Master of the Rolls, that the trust for sale is bad.

Sir *George Jessel*, however, does not say (though his language may seem to imply) that the beneficial interests would have failed but for the trust of the rents and profits until sale. The point may be of some practical importance, for in modern settlements it is not an uncommon practice to convey reversionary interests to trustees upon trust to sell, but not until the reversion has fallen into possession, a period which possibly may extend beyond the perpetuity limit. As at present advised, I should not be prepared to hold that the interests of the beneficiaries would fail notwithstanding the invalidity of the trust for sale. To hold, for example, that a trust to sell at a period beyond the perpetuity limits and divide the proceeds between a class ascertained within those limits, is entirely invalid; but that a trust to divide at the same period between the members of the same class, accompanied by a power to sell for purposes of division, is good as regards the equitable interests, would, in my judgment, be to sacrifice substance to form. Cases may possibly occur where the trust for sale and the beneficial interests thereunder are so inextricably mixed up that both must stand or fall together; but where it can be seen that the trust for sale is mere

(1) 18 Ch. D. 429.

STIRLING, J.
1893
GOODIER v. EDMUNDS.

machinery for facilitating a division between the persons for whom the property is destined, I think that effect ought to be given to the equitable interests, even though the instrument by means of which the division is intended to be carried out may prove to be unavailing. In the present case, I should have thought that, in the absence of the trust of the rents and profits until sale, the beneficiaries ought to be held entitled, but that the beneficial interests would devolve as real estate; for I apprehend that nothing short of an absolute and effective trust for sale can in equity create a conversion of realty into personalty: see *Hyett* v. *Mekin* (1). However that may be, there is a trust of the rents and profits until sale for the persons to whom the proceeds of sale are given; and consequently (as was pointed out by the late Master of the Rolls) there can be no doubt that the interests of the beneficiaries do not fail; and I am of opinion that the real and not the personal representatives of the deceased child of *Mary Beech* are entitled to his share of the proceeds.

I ought, perhaps, to add that the preceding observations are not intended to apply to a case where the trust or power of sale is preceded by limitation of an estate tail. There considerations of a different kind are to be taken into account: see *Heasman* v. *Pearse* (2).

Solicitors: *Rowcliffes, Rawle & Co.*, agents for *T. W. Hensley, Nantwich*; *Godden, Holme & Co.*, agents for *A. G. Hill, Crewe*; *The Solicitor to the Duchy of Lancaster.*

(1) 25 Ch. D. 735. (2) Law Rep. 7 Ch. 275, 282-3.

W. W. K.

Ex parte BRADFORD AND DISTRICT TRAMWAYS COMPANY.

STIRLING, J.
1893
June 8.

Company—Parliamentary Deposit—Abandonment of Undertaking—Repayment of Deposit—Creditors, Meritorious and non-Meritorious—Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict. c.* 27), *s.* 1, *sub-s.* 2.

All distinction between meritorious and non-meritorious creditors as to the right, upon the abandonment of an undertaking, to share in the deposit made by the promoters in order to obtain from the Board of Trade the provisional order authorizing the undertaking, has, since the passing of the *Parliamentary Bonds and Deposits Act,* 1892, ceased to exist.

Persons who lent the money to the promoters of the undertaking to enable them to make the deposit, are "creditors" entitled, under sect. 1, sub-sect. 2, of that Act, upon the abandonment of the undertaking, to share in the deposit fund *pari passu* with the other creditors of the company.

The word "creditors" in sub-sect. 2 is not limited to the creditors of the particular undertaking which has been abandoned, but includes the general creditors of the company.

ADJOURNED SUMMONS.

In May, 1890, the *Bradford and District Tramways Company,* a company incorporated and carrying on business in the usual way, being desirous of extending their undertaking, applied to the Board of Trade for a provisional order authorizing them to make the extension.

Under the Board of Trade Rules and the *Tramways Act,* 1870 (33 & 34 Vict. c. 78), it was requisite for the company to deposit in Court the sum of £546 before the provisional order could be delivered to them by the Board of Trade, and for this purpose the company borrowed from the *London Joint Stock Association* the sum of £546. The association advanced the money upon the terms of an agreement, dated the 30th of May, 1890, whereby the company agreed to assign to the association, by way of security for the loan, all the interest of the company in the provisional order, and in the money deposited, and to give certain other security.

The £546 was duly paid into Court by Messrs. *McMillan* and *Hill,* two of the directors of the company, under sect. 12 of the

STIRLING, J. 1893

Ex parte BRADFORD AND DISTRICT TRAMWAYS COMPANY.

Tramways Act, 1870. The order was delivered to the company, and was confirmed by an Act of 1890.

The scheme for the extension, however, proved abortive, the powers conferred by the Act lapsed, and that portion of their undertaking had to be abandoned by the company.

This was an application under the *Parliamentary Deposits and Bonds Act*, 1892, for the decision of the Court as to the persons who were now entitled to the money which had been deposited.

By sect. 1, sub-sect. 2, of that Act: "The High Court may if . . . . the undertaking has been abandoned, order that the deposit fund or any part thereof be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof."

There were three sets of claimants to the deposit fund: (1.) *Henry Kendrick*, on behalf of the debenture-holders of the association, whose security included the £546 which had been lent; (2.) the executors of *Charles Edward Bissill*, deceased, on behalf of themselves and all others the debenture-holders of the company; and (3.) Messrs. *Harper & Battcock*, the solicitors of the company, whose claim was chiefly for unpaid costs incurred in obtaining the extension order.

The debenture-holders of the company did not claim the deposit fund upon the ground that it formed part of their security, but upon the ground that they were "meritorious creditors," coming with a *bonâ fide* case. It appeared that in August, 1888, the company had issued certain first mortgage debentures, which were charged upon their then-existing undertakings and plant; and that they had afterwards issued scrip certificates on account of a second series of debentures, subscriptions for which were invited in October, 1890. These debentures were to have been a charge upon the rolling stock which should be bought out of the sums advanced; but they never were in fact issued. In February, 1891, a debenture-holder's action had been brought against the company by the executors of Mr. *Bissill*, in order to enforce the security of the first debenture-holders, in which a receiver had been appointed in March, 1891. £11,465 5*s*. 7*d*. was due in respect of the first mortgage debentures, and £5743 2*s*. was due

in respect of the scrip certificates. The assets of the company were insufficient to pay these amounts, and the debenture-holders claimed to be *bonâ fide* and meritorious creditors of the company in respect of the deficiency, and that, subject to any compensation to landlords which might be payable thereout, the deposit fund was part of the assets of the company for the benefit of its creditors, and ought to be apportioned among the holders of its debentures or scrip certificates *pari passu* with all other the meritorious creditors of the company.

Swinfen Eady, for the *London Joint Stock Association*:—

Since the *Parliamentary Deposits and Bonds Act*, 1892, came into operation there is no longer any distinction between meritorious and non-meritorious creditors: *In re Hull, Barnsley and West Riding Junction Railway Company* (1). In respect of the money we lent them we are creditors of the company within the meaning of sect. 1, sub-sect. 2 of the Act, and as such are entitled to share in deposit fund.

Hastings, Q.C., and *Bissill*, for the debenture-holders:—

The intention of the *Tramways Act*, 1870, and the *Board of Trade Regulations* thereunder was that the promoters of the company are not directly nor indirectly to get back the deposit if the tramway is not completed: *In re Bradford Tramways Company* (2); *In re Lowestoft, Yarmouth and Southwold Tramways Company* (3). The association were not directly the promoters of this undertaking; but they lent the company, who were the promoters, the money to pay the deposit for this abortive scheme. They are not, therefore, *bonâ fide* "creditors" of the company within the meaning of sect. 1, sub-sect. 2 of the Act of 1892, and ought to be postponed to those who are. We do not dispute the claim of Messrs. *Harper & Battcock*, the solicitors to the company.

Butcher, for Messrs. *Harper & Battcock*:—

We are entitled to be paid out of the fund, not only in priority to the association, but also in priority to the debenture-holders.

(1) W. N. (1893) 83. (2) 4 Ch. D. 18.
(3) 6 Ch. D. 484.

STIRLING, J.

1893

Ex parte BRADFORD AND DISTRICT TRAMWAYS COMPANY

The security of the debenture-holders did not include this undertaking, and the expression "creditors" in sub-sect. 2 of sect. 1 of the Act of 1892 must be read as limited to creditors of the particular undertaking in respect of which the deposit was made.

STIRLING, J.:—

It seems to me that all the three classes of creditors must be admitted to share in this deposit. I think that all the points raised are covered by the judgment in *In re Hull, Barnsley and West Riding Junction Railway Company* (1) before Mr. Justice *Chitty*, which was an exposition by him of the effect of sect. 1 of the *Parliamentary Deposits and Bonds Act*, 1892.

The *Bradford and District Trams and Tramways Company* are an incorporated company carrying on business as a tramway in the usual way, and desiring an extension of their undertaking, they applied to the Board of Trade for an order enabling them to make it. The company were promoters within the meaning of the Act of 1870 with reference to this order, and the undertaking mentioned in it. For the purpose of obtaining the order the company were obliged to make the deposit with which the Court has now to deal. The actual depositors were Messrs. *McMillan & Hill*, two of the directors of the company, and they made the deposit on behalf of the company. In order to enable them to do so, the company borrowed the sum required from the *London Joint Stock Association*, upon the terms contained in an agreement dated the 30th of May, 1890, by which they gave the lenders certain security. It is plain from that document that the transaction was intended to be in the nature of a loan by the association to the company, and I cannot see why the association are not creditors of the company in respect of the loan so made. It is said that so to treat them is contrary to the policy of the legislature. It was contrary to the policy of the *Board of Trade Rules* under the Act of 1870, which regulated these matters before the *Parliamentary Deposits and Bonds Act* of 1892 was passed, and under which the cases of *In re Bradford Tramways Company* (2) and *In re Lowestoft, Yarmouth, and Southwold Tramways Company* (3) were decided; but, the policy of the Legislature has been altered, and,

(1) W. N. (1883) 83. (2) 4 Ch. D. 18. (3) 6 Ch. D. 481.

as was pointed out by Mr. Justice *Chitty* in the case of *In re Hull, Barnsley, and West Riding Junction Railway Company* (1), all distinction between meritorious and non-meritorious creditors has, since the passing of the Act of 1892, ceased to exist. The association, therefore, must, it appears to me, be treated as creditors of the company as much as any other creditors.

Then it is contended that, under sub-sect. 2 of sect. 1 of the Act of 1892, the Court has a discretion to "order that the deposit fund or any part thereof be . . . . applied as part of the assets of the company for the benefit of the creditors thereof," and that that ought to be read as limited to the "creditors" who are creditors of the company "in respect of the particular undertaking which has been abandoned." Those words, however, are not in that sub-section, and in the absence of them I do not feel inclined to so limit the creditors. I understand Mr. Justice *Chitty* to have entertained a like opinion in the case of *In re Hull, Barnsley, and West Riding Junction Railway Company*. He was there considering another matter, namely, what notices ought to be given; and he pointed out that the Court had "a judicial discretion as to what public notices should be directed," and that "in the case of a large railway company" like the one before him, "which was carrying on its undertaking as a going concern, though it had permitted the statutory time for completion of a portion of its line to expire, it would not be reasonable to require public notice to be given to all the creditors of the company, on an application for return of the deposit made in respect only of a small portion of the undertaking." That could only have been said upon the footing that all the creditors of such a company were entitled to a share of the fund; and, as I say, there are no words in sub-sect. 2 which limit the word "creditors" to the creditors of the particular undertaking which has been abandoned. I think, therefore, that all the three classes of creditors are entitled to have the funds divided between them *pari passu*.

Solicitors: *Ashurst, Morris, Crisp & Co.; Trass & Jarmain; Harper & Battcock.*

(1) W. N. (1893) 83.

STIRLING, J.

1893

May 3; *June* 20.

In re CAMPBELL. CAMPBELL *v.* CAMPBELL.

[1893 C. 720.]

Will—Legacy—Power to postpone Sale and Conversion of Estate—Non-appropriation to answer Legacy—Trustee entitled to Share in Residue—Increased Value of outstanding Estate—Right of Legatee to Share in Increase of funds.

A testator by his will gave his real and residuary personal estate upon trust for sale and conversion, and as to the sum of £20,000, part of the trust moneys, upon trust for his son *C.* for life, with remainder to *C.*'s children, giving the residue of the trust moneys between his other two sons, and giving his trustees a discretionary power to postpone the sale and conversion of the estate so long as seemed to them expedient.

The trustee, who was one of the residuary legatees, neither paid nor appropriated funds to meet the legacy of £20,000, but retained the trust estate in its original state of investment, meanwhile paying *C.* interest at 4 per cent. upon the amount of the legacy.

The investments of the estate having risen considerably in value, *C.* and his children, more than ten years after the death of the testator, claimed to participate in the increase of value, on the ground that the trustee, being a residuary legatee, could not retain profits caused by his own default:—

Held, that the residuary legatees must be treated as owners of the estate, subject to a charge thereon of the legacy, and that *C.* and his children were only entitled to the amount of their legacy with interest at 4 per cent. from the end of the year after the death of the testator.

ADJOURNED SUMMONS.

John Campbell, by his will, dated the 21st of January, 1873, appointed his wife, *Mary Campbell*, and his two sons, *Colin Minton Campbell* and the Defendant *Herbert Campbell*, executrix and executors and trustees of his will, and, after making various specific and pecuniary bequests, devised and bequeathed all his real and residuary personal estate upon trust to permit his wife to occupy his dwelling-house free from rent, and subject thereto upon trusts for sale and conversion, and payment of his funeral and testamentary expenses and his debts. And upon further trust to pay to his wife an annuity of £2000 during her life. And as to the sum of £20,000 (part of the said trust moneys), upon

trust to invest the same in any of the stocks, funds, or shares thereinafter specified, and to pay the income to his son, the Plaintiff *Charles Lee Campbell*, during his life, and after his decease, upon trusts for the benefit of his children; and as to the residue of the said trust moneys, to divide and pay the same between and to such of his sons, *Colin Minton Campbell*, *Arthur Minton Campbell*, and the Defendant *Herbert Campbell*, as should survive him, and the issue who should attain twenty-one or marry of such of them his said sons as should be then dead.

The will authorized a considerable range of investments, and gave the trustees discretionary authority to postpone, for such period as might to them seem expedient, the sale of all or any part of his real, leasehold, and residuary personal estates, and the getting in of such parts of his residuary personal estate as should consist of stocks, funds, shares, or securities of any description whatever; but the testator declared that, from the time of his decease, the unsold real, leasehold, and personal estates, and the outstanding personal estate, should be subject to the trusts thereinbefore declared concerning the money to arise from or be received on account of the same respectively; and that the rents, interest, and annual produce thereof should be deemed annual income for the purposes of the trusts aforesaid.

By a codicil dated the 29th of May, 1880, the testator revoked all the devises and bequests contained in his will for the benefit of his son *Arthur Minton Campbell* (who had then lately died), his wife or children; and, after making certain provisions for the benefit of the widow and children of *Arthur Minton Campbell*, he confirmed his will in all other respects.

The testator died on the 8th of January, 1882, leaving his wife, *Mary Campbell*, and his sons, the Plaintiff *Charles Lee Campbell*, *Colin Minton Campbell*, and *Herbert Campbell*, him surviving. The will and codicil were proved by the two executors.

The testator's widow died on the 2nd of April, 1885. His son *Colin Minton Campbell* died on the 8th of February, 1885, and since his death the Defendant *Herbert Campbell* had been the sole executor and trustee of the will.

The legacy of £20,000 bequeathed upon trusts for the benefit of the Plaintiff *Charles Lee Campbell* and his children had never

STIRLING, J. 1893 *In re* CAMPBELL CAMPBELL v. CAMPBELL

been raised, invested, or appropriated; but interest thereon at 4 per cent. had been paid to *Charles Lee Campbell.*

The testator's residuary estate remained practically in the same state of investment as at his death; most of the investments had in the interval risen very considerably in value, but a few had fallen.

The Plaintiff *Charles Lee Campbell* had recently become aware that no appropriation had been made in respect of the legacy bequeathed upon trust for himself and his children, and applied to the Defendant on the subject. The Defendant expressed his willingness either to pay over to trustees of the legacy £20,000 in cash, or to appropriate authorized securities equal in value to that sum at the market price of the day on which the securities were appropriated. The Plaintiff, however, insisted that he and his children were entitled to participate in the increase of value in the investments representing the testator's personal estate; and he and one of his children took out this summons asking the Court to determine what part or parts of the stocks, funds, and securities retained or held by the Defendant upon the trusts of the will ought to be deemed to represent the trust legacy of £20,000, and what sum of cash, or what stocks, funds, and securities, ought now to be set apart as and for the said trust legacy.

Hastings, Q.C., and *Dibdin*, for the Plaintiffs:—

It was the duty of the trustees within a year after the testator's death to pay over or to invest or appropriate the sum of £20,000 for the benefit of the Plaintiff *Charles Lee Campbell* and his children. Instead of doing so this trustee, who is also one of the residuary legatees, kept the whole of the trust funds in his own possession, and by his own default has realized large profits. These profits he cannot be allowed to keep. He must account for them. If our legacy had been paid or appropriated we should have shared in the profits which he has put into his own pocket. A trustee cannot retain profits made out of the trust estate, and, *à fortiori*, he cannot do so when he is also a residuary legatee and the profits are made through his own breach of duty: *Knox* v. *Mackinnon* (1).

(1) 13 App. Cas. 753.

R. N. Arkle, for the Defendant *Herbert Campbell*:—

Even if the trustees have been administering the trust in the way most beneficial for the residuary legatees, a pecuniary legatee has no title to object, or to share in the increase in the value of the residuary estate: all that he is entitled to is the principal money of his legacy with proper interest. In this case the will contained express powers enabling the trustees to postpone the sale and conversion of the estate. These powers could only be used for the benefit of the residuary legatees, and the trustees were perfectly justified in exercising them, and have committed no breach of trust or duty in so doing: *Sitwell* v. *Bernard* (1). There is no case in which a pecuniary legatee has ever been held entitled to share in an increase in the value of the property out of which his legacy might have been paid, and the fact of the trustee being also one of the residuary legatees makes no difference. The Plaintiff *Charles Lee Campbell* has lost nothing, for the trustees might have invested his £20,000 in Consols; whereas he has for over ten years had 4 per cent. upon the amount.

Hastings, in reply.

June 20. STIRLING, J. (after stating the facts of the case, continued):—

If the Defendant were not beneficially interested in the residue, all that he could be called upon to do would be to pay over to the new trustees who are proposed to be appointed the sum of £20,000 with interest at 4 per cent. down to the time of payment: see *Robinson* v. *Robinson* (2). In that case a testator had given his residuary personal estate to trustees upon trust for conversion and investment in "parliamentary stocks or funds or on real securities." The trustees omitted for a considerable period to convert certain parts of the residuary estate. When they did sell them the price was higher than would have been obtained at the expiration of a year from the testator's death; but the price of Consols was also higher, and upon the re-investment a less sum was realized than could have been produced if the investment

(1) 6 Ves. 520. (2) 1 D. M. & G. 247.

STIRLING, J.
1893
In re CAMPBELL. CAMPBELL v. CAMPBELL.

had been made at the expiration of the year; and it was sought to charge the trustees with the amount of stock which might have been purchased at that time. It was held that this relief could not be given.

Lord *Cranworth*, in delivering the judgment of the Court of Appeal, says (1): "In a case where a trustee, having an option to invest either in £3 per cents., or on real security, neglects his duty and carelessly leaves the trust funds in some other state of investment . . . the *cestui que trust* cannot say to the trustee, If you had done your duty I should now have had a certain sum of £3 per cents., or the trust fund would now consist of a certain amount of £3 per cents. It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued. Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee: and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust." And again (2): "The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed." It was accordingly held that the trustees were only bound to replace the trust moneys with interest at 4 per cent.

Where a legacy has not been paid at the proper time, then, as between the legatee and the person entitled to the residue, it has been the rule of the Court ever since *Sitwell* v. *Bernard* (3), decided in 1801, to allow the legatee interest at the rate of 4 per cent. only (in the absence of special circumstances), even although the residue may have produced interest at a higher rate. Lord *Eldon* treats this as a rule of convenience, and says (4): "It is a general rule, that where no interest is given by the will, except where it is given by way of maintenance, it is only to be allowed at 4 per cent. from the end of the year, though it may appear to

(1) 1 D. M. & G. 257.
(2) Ibid. 258.
(3) 6 Ves. 520.
(4) Ibid. 540.

have produced in the period interest at 5 per cent. Particular justice is disappointed in particular cases: but upon this principle, alluded to by Lord *Thurlow* in *Hutcheson* v. *Mannington* (1), that the inquiry as to the state of the personal estate, when each and every part could be got in and made productive, is endless and immeasurable, the Court cuts the knot by doing what in general cases is convenient; though in particular cases both convenience and justice may be disappointed." I know of no case in which a legatee has been held entitled to share in the increase of value in property applicable for payment of his legacy. Where such property is reversionary and the legacies are not paid until the reversion falls in, the legatees have been held entitled to the amount of their legacies with interest at 4 per cent., but nothing more: *In re Blachford* (2). If then the defendant were a trustee for third parties, I think that neither he nor the beneficiaries could in the present case be charged with more than the amount of the legacy and interest at 4 per cent.

Does it make any difference that the Defendant is at once trustee and beneficiary? No authority to this effect has been cited; but it is argued that the Defendant has been guilty of a breach of trust in not investing the legacy, or appropriating proper securities to meet it; and that he cannot be allowed to benefit by such a breach of trust, but must account to the legatees for any profit he has then made. If it were made out that the Defendant had unwarrantably applied the money of his *cestui que trust* to his own purposes—if, for example, the estate of the testator after payment of debts had been less than £20,000, and the Defendant had sold the investments and embarked the proceeds in trade—it might be right to make him account for all the profits earned. But what has been done is simply to leave the estate as it was at the testator's death, without making any investment or appropriation to meet the legacy. To deal with the Defendant in the mode suggested would, as it seems to me, be to introduce all the difficulties referred to by Lord *Eldon*, to avoid which the rule of giving interest at 4 per cent. was laid down. It would be extremely difficult, to say the least, to determine in the present case what proportion of the increased value

(1) 1 Ves. 366. (2) 27 Ch. D. 676.

STIRLING, J. 1893 *In re* CAMPBELL. CAMPBELL *v.* CAMPBELL.

of the testator's estate is attributable to the Plaintiffs' legacy. I think that the residuary legatees ought to be treated under the circumstances of this case as the owners of the estate, subject to a charge thereon of the Plaintiffs' legacy with interest at 4 per cent. This being so, the application fails, and I think the Applicants ought to pay so much of the costs as have been occasioned by the contest which they have unsuccessfully raised.

Solicitors: *Bridges, Sawtell, Heywood, Ram, & Dibdin; Field, Roscoe & Co.*, agents for *Gibbons & Arkle, Liverpool.*

W. W. K.

STIRLING, J. 1893 *June* 8, 14, 15; *July* 5.

GREENHILL *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[1893 G. 415]

Husband and Wife—Settlement—Ante-nuptial Agreement—Wife's Reversionary Chose in Action—Interest derived under Instrument made before Malins' Act (20 & 21 *Vict. c.* 57)—*Election to confirm Settlement.*

A husband and wife had, previously to their marriage, entered into an agreement for the settlement of all the wife's property, including a policy of insurance on the life of another to which she was entitled under an instrument made before *Malins' Act.* A memorandum in writing of this agreement was signed before the marriage by the husband alone, and the settlement therein referred to was, after the marriage, also executed by the husband, but not by the wife. By it the husband and wife covenanted to assign to trustees all her property upon trust for the wife for life, and after her death as she should appoint, and in default of appointment for the children of the marriage, and if there should be none for the husband. By a subsequent deed acknowledged by the wife under the *Fines and Recoveries Act* the policy was assigned and certain real estate of the wife's was conveyed to the trustees of the settlement. The wife subsequently, in exercise of her power under the settlement, mortgaged the policy:—

Held, that the wife by acting on the contract and taking the benefit of it had elected to confirm the settlement, and was bound in equity to perform it fully, and that consequently the mortgage was valid.

Neither the decision in *Seaton* v. *Seaton* (1) nor the observations of Lord *Herschell* in that case are inconsistent with *Barrow* v. *Barrow* (2) and *Wilder* v. *Pigott* (3).

THIS was an action brought to obtain payment of the amount due on a policy of insurance effected with the Defendant company

(1) 13 App. Cas. 61. (2) 4 K. & J. 409. (3) 22 Ch. D. 263.

on the life of *Benjamin Barber*, who died on the 21st of November, 1891. The Plaintiffs claimed under a charging order dated the 2nd of September, 1885. The Defendant company had paid the amount to the *Provident Permanent Benefit Building Society*, who claimed to be assignees of the policy. The question was, whether this payment was justified.

In 1853 *Sarah Ann Smith* was, under the will of her late husband, beneficially and absolutely entitled to the policy in question.

In October, 1853, a marriage was about to be solemnized between *S. A. Smith* and *Alfred Greenhill*; and in contemplation of it a settlement was prepared and engrossed. It was not executed by any party previously to the marriage; but on the 28th of October *Alfred Greenhill* signed a memorandum in the following terms: "*Alfred Greenhill* agrees with *S. A. Smith* that he will, at any time hereafter when called upon so to do, sign, seal, and execute the deed of settlement drawn, engrossed, and intended to have been executed previous to the contemplated marriage between the said *Alfred Greenhill* and the said *S. A. Smith*." This memorandum was not signed by *S. A. Smith*. The marriage took place on the 29th of October. Subsequently *Alfred Greenhill* (but not *S. A. Greenhill*) executed the deed referred to in the memorandum. It purported to be made between *Alfred Greenhill* of the first part, *S. A. Smith* of the second part, and *William Champain Hall* and *S. A. Mumford* of the third part, and thereby, in consideration of the intended marriage, it was agreed and declared between and by the parties thereto, and *Alfred Greenhill* and *S. A. Smith* each covenanted with *Hall* and *Mumford* that in case the intended marriage should take effect they, *Alfred Greenhill* and *S. A. Smith* and each of them, would immediately after the solemnization thereof effectually surrender, transfer, and assign certain copyhold or customary hereditaments, and all stocks, funds, or Government annuities, and all and every other the property or properties real or personal, or of any other description then belonging to the said *S. A. Smith* (except apparel, jewels, ornaments, and other personal effects) unto *Hall* and *Mumford* upon trust to pay the income to *S. A. Smith*, or permit her to receive the same during her life for her separate

STIRLING, J.

1893

GREENHILL v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

use, and after her death for such person or persons, and for such interest or interests, and in such manner as she should by deed or will appoint, and in default of appointment upon trusts for the benefit of the children of *S. A. Smith* of the intended or any future marriage, and in default of such issue for *Alfred Greenhill*, his heirs, executors, and assigns absolutely.

By an indenture dated the 7th of March, 1854, indorsed on the settlement and made between *Alfred Greenhill* and *S. A. Greenhill*, his wife, of the one part, and *Hall* and *Mumford* of the other part, and which was acknowledged by Mrs. *Greenhill* in accordance with the *Fines and Recoveries Act*, after reciting the solemnization of the marriage, and that previously to the marriage an agreement in writing, bearing date the 28th of October, 1853, was entered into between Mr. and Mrs. *Greenhill*, and that in pursuance of such written agreement *Alfred Greenhill* had executed the settlement on or about the 8th of November, 1853, it was witnessed that Mr. and Mrs. *Greenhill* thereby granted and conveyed to *Hall* and *Mumford* an annuity of £200, issuing out of certain real estate, and also assigned to them five policies of insurance (including that as to which the question arose in this action) upon the trusts of the settlement.

Mrs. *Greenhill* subsequently by various deeds assigned her life interest and executed the power of appointment vested in her by the settlement by way of mortgage of (amongst other property) the policy of assurance for securing repayment of advances made to her.

These mortgages were afterwards transferred to the trustees of the *Provident Society*, who on the 11th of June, 1875, filed a bill of complaint in the High Court of Chancery against Mr. and Mrs. *Greenhill* and certain other persons as Defendants, praying that an account might be taken of what was due to the said society upon the mortgages. Mrs. *Greenhill* obtained leave to put in a separate answer, and accordingly, on the 12th of October, 1875, filed such answer, and thereby set up as a defence to the bill, that the securities sought to be enforced in the suit were obtained from her under the coercion of the said *Alfred Greenhill*. She did not, however, in any way dispute that the agreement for the settlement (the facts as to which were stated in the bill) was binding on her.

On the 22nd of June, 1877, the usual foreclosure judgment was given in the suit against both Mr. and Mrs. *Greenhill*, and on the 2nd of November, 1878, an order for foreclosure absolute was made against them.

Mr. *Greenhill* died on the 27th of February, 1885. On the 2nd of September, 1885, Messrs. *Prior, Church, & Adams*, three of the Plaintiffs in this action, obtained, in an action of *Prior* v. *Greenhill*, to which Mrs. *Greenhill* was a Defendant, an order charging her interest in the policy with the payment to those Plaintiffs of the sum of £419 11*s.* 3*d.*; and notice of the order was duly given to the Defendant company. *Benjamin Barber*, on whose life the insurance was effected, died on the 21st of November, 1891. Mrs. *Greenhill* died on the 27th of May, 1892; and letters of administration with her will annexed were granted to the Plaintiff *Thos. Wm. Greenhill* on the 1st of March, 1893. From these circumstances and others, which it is not necessary here to state, his Lordship drew the following inferences of fact:—

(1.) An agreement for the settlement of all the property of Mrs. *Greenhill*, including the policy in question, was come to between Mr. and Mrs. *Greenhill* before their marriage.

(2.) A memorandum in writing of the agreement was made and was signed before the marriage by Mr. *Greenhill*, but not by Mrs. *Greenhill*.

(3.) After the marriage Mrs. *Greenhill* acted on the contract and took the benefit of it.

Hastings, Q.C., and *C. Church*, for the Plaintiffs:—

A policy of insurance upon the life of another is a reversionary *chose in action: Witherby* v. *Rackham* (1). A married woman cannot dispose of a *chose in action*, her title to which accrued before the 31st of December, 1857, that being the date of operation of *Malins' Act*. That is a rule which cannot be got over. This case stands in the same position as if Mrs. *Greenhill* had survived her husband, and was now coming to the insurance office for payment of the policy. Before her marriage she might have settled the policy and reserved to herself a power of

(1) 7 Times L. R. 380.

STIRLING, J.
1893
GREENHILL v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

appointment. She, however, never executed the memorandum of agreement, and after the marriage she was absolutely precluded from dealing with the policy. The operation of the *Statute of Frauds* prevented the agreement from being binding upon her, though she might have enforced it against her husband.

It is said, however, that there has been an election by her to be bound by it. That suggestion is disposed of by the observations of Lord *Herschell* in *Seaton* v. *Seaton* (1). His Lordship in that case said: "If she" (the married lady) "could not by deed, however solemnly executed, dispose directly during her coverture of her reversionary interest, I am quite at a loss to understand how by any estoppel or actings or otherwise she can be held indirectly to have disposed of it."

At the time when we obtained our charging order the policy was unincumbered.

Buckley, Q.C., and *F. Thompson*, for the Defendants:—

At the date of the Plaintiffs' charging order Mrs. *Greenhill* had no interest in the policy.

Although a married woman in such a case as this cannot dispose of her reversionary *choses in action*, yet they may become bound on two grounds: First, on the ground of fraud, as illustrated by the case of *Vaughan* v. *Vanderstegen* (2); or, secondly, on the ground of election: *Barrow* v. *Barrow* (3); *Wilder* v. *Pigott* (4). Mrs. *Greenhill* must be treated as having by her acts adopted the settlement, and she is accordingly bound by it, although it was never executed by her: *Lee* v. *Lee* (5); *Viret* v. *Viret* (6). *Seaton* v. *Seaton* was a case under the *Infants' Settlement Act*, and does not affect the previous decisions.

[They also cited *Savage* v. *Foster* (7); *Mallack* v. *Galton* (8); *Cahill* v. *Cahill* (9); *Heath* v. *Pugh* (10), and *Hill* v. *Edmonds* (11).]

(1) 13 App. Cas. 61, 73.
(2) 2 Drew. 363.
(3) 4 K. & J. 409.
(4) 22 Ch. D. 263.
(5) 4 Ch. D. 175.
(6) 17 Ch. D. 365, n.
(7) 9 Mod. 35.
(8) 3 P. Wms. 352.
(9) 8 App. Cas. 420.
(10) 6 Q. B. D. 345.
(11) 5 De G. & Sm. 603.

Hastings, in reply:—

Mrs. *Greenhill* could not bind her reversionary interest in the policy during the coverture, and has done nothing by which it could be at all affected. There was certainly no fraud, as in *Vaughan* v. *Vanderstegen* (1), and even if there had been the Court could not compel her to do more than convey what she had power to convey. For instance, if a married woman has property which is fettered by a restraint upon anticipation, and deals with it concealing the restraint, she cannot be ordered to convey the property: *Clive* v. *Carew* (2); *Arnold* v. *Woodhams* (3); *Stanley* v. *Stanley* (4).

[*F. Thompson* referred to *In re Lush's Trusts* (5).]

That was a case of an equity to a settlement, which is a creature of equity, and under the control of the Court, who can of course in a proper case withhold it.

Whether there is any fraud or not the Court cannot enable a married woman to do what she cannot do either by law or statute: *Robinson* v. *Wheelwright* (6). She has not confirmed the agreement by anything she has done, nor has she made any misrepresentation. The doctrine of election, viz., that you cannot at once claim the benefit of a deed and repudiate its obligations, does not apply: *Codrington* v. *Lindsay* (7).

It was applicable in *Barrow* v. *Barrow* (8), because there the wife had the benefit of the husband's contract. Here the husband incurred no obligations, and the wife got no benefit. There was no reality in the settlement, and the wife could create these mortgages, which would be good as far as they went. She would not be bound by them unless the reversionary interest fell in during the coverture or she survived her husband; but they would bind the husband. If a woman entitled to a reversionary *chose in action* marries without having become possessed of it and a post-nuptial settlement is made, that does not bind her: *Whittle* v. *Henning* (9).

(1) 2 Drew. 363.
(2) 1 J. & H. 199.
(3) Law Rep. 16 Eq. 29.
(4) 7 Ch. D. 589.
(5) Law Rep. 4 Ch. 591.
(6) 6 D. M. & G. 535.
(7) Law Rep. 8 Ch. 578.
(8) 4 K. & J. 409.
(9) 2 Ph. 731.

STIRLING, J.
1893
GREENHILL v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

In *Wilder* v. *Pigott* (1) the reversion had fallen in, and that makes it quite a different case; but both that case and *Barrow* v. *Barrow* (2) are overruled by *Seaton* v. *Seaton* (3). Mrs. *Greenhill* cannot be said to have elected to be bound by the settlement, and mere acquiescence is not enough to constitute a conveyance of her reversionary *choses in action*: *Ashton* v. *M'Dougall* (4).

STIRLING, J. (after stating the facts, continued):—

The interest of Mrs. *Greenhill* in the policy was at the time of the marriage, and throughout her coverture future or reversionary, and as she was entitled to it under an instrument (viz. her first husband's will) made before the 31st of December, 1857, the provisions of Vice-Chancellor *Malins' Act* (20 & 21 Vict. c. 57) were inapplicable; and consequently the deed of the 7th of March, 1854, was ineffectual to bind it.

The question then arises whether Mrs. *Greenhill* has by acting on the contract and taking the benefit of it become bound in equity to perform it to the full.

In *Barrow* v. *Barrow* it was held that a married woman, by obtaining a decree for specific performance of a covenant in an ante-nuptial settlement relating to her real estate made when she was an infant, had elected so as to bind in equity her interest in the real estate, and had become herself bound to carry the whole of the settlement into effect. It does not appear to be necessary for the purpose of making the election that the married woman should in such a case institute legal proceedings; it would seem to be enough that she should unequivocally claim the benefit of it: see *Williams* v. *Baily* (5) and *Smith* v. *Lucas* (6). In *Wilder* v. *Pigott*, it was held by Mr. Justice *Kay* that a married woman who after attaining twenty-one executed an acknowledged deed confirming a settlement made by her while an infant had elected to confirm it, and that a contingent reversionary interest in personalty which she was incompetent to deal with under Vice-Chancellor *Malins' Act*, became thus bound by the settlement. His Lordship in that case said (7): "The first

(1) 22 Ch. D. 263.
(2) 4 K. & J. 409.
(3) 13 App. Cas. 61.
(4) 5 Beav. 56.
(5) Law Rep. 2 Eq. 731.
(6) 18 Ch. D. 531.
(7) 22 Ch. D. 267.

question is whether the wife could elect during her coverture to confirm the settlement. It seems clear from the decisions in many cases, of which *Barrow* v. *Barrow* (1) and *Smith* v. *Lucas* (2) are examples, that she could so elect. Then has she in fact elected? I cannot doubt that the acts which I have referred to, and which manifested a deliberate intention on her part to recognise the settlement, amounted to an election to confirm it. The effect of such a confirmation was to make the settlement as binding and as operative in equity as it would have been if she had been of full age at the time when she executed it. In that case it is not disputed that this contingent reversionary property would have been bound in equity by the settlement. It was more than a mere expectancy, it was property to which she was at the date of the settlement contingently entitled in reversion; and it seems to come within the very words of the first assignment as well as of the covenant. The covenant, as was remarked in *Smith* v. *Lucas*, was not void but only voidable, and when ratified was as binding as if it had been originally made by a person who was *sui juris*."

It is said, however, that what is there laid down conflicts with the decision of the House of Lords in *Seaton* v. *Seaton* (3), where it was held that a post-nuptial settlement made by an infant married woman and her husband under the provisions of the *Infants' Settlement Act*, 1855, did not bind a reversionary interest in personalty to which the lady was entitled under a will which came into operation before the passing of Vice-Chancellor *Malins' Act*, and reliance is placed on the observations of the present Lord Chancellor. He says (4): "If she" (the married lady) "could not by deed, however solemnly executed, dispose directly during her coverture of her reversionary interest, I am quite at a loss to understand how by any estoppel or actings or otherwise she can be held indirectly to have disposed of it." In that case, however, the House of Lords was dealing with a post-nuptial settlement, and it was decided that the *Infants' Settlement Act*, though it removed the disability of infancy, did not remove the disability of coverture. In the Court of Appeal it is expressly pointed out

(1) 4 K. & J. 409.
(2) 18 Ch. D. 531.
(3) 13 App. Cas. 61.
(4) Ibid. 73.

STIRLING, J.
1893
GREENHILL v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

by Lord Justice *Lindley* (1) that it was impossible to treat the settlement as having been executed before the marriage. In my opinion neither the decision in *Seaton* v. *Seaton* (2), nor the observations of the Lord Chancellor (which I think must be read with reference to the circumstances of the case with which the House of Lords was dealing), are inconsistent with what is laid down by Mr. Justice *Kay* in *Wilder* v. *Pigott* (3). I may point out that that case was cited in the argument in *Seaton* v. *Seaton*, but is not in any way commented upon by any of the noble and learned Lords who advised the House, much less is it treated as overruled or dissented from.

In the present case an agreement for a settlement was come to before the marriage of Mr. and Mrs. *Greenhill*; and but for the provisions of the *Statute of Frauds* that agreement would have been completely binding on all parties. That statute prevented any action being brought on the agreement against Mrs. *Greenhill*, though she might have brought an action to enforce it against Mr. *Greenhill*. She did not bring an action, but by her acts she recognised the agreement and elected to have the benefit of it. To such a state of things the principles laid down in *Barrow* v. *Barrow* (4) and *Wilder* v. *Pigott* appear to me to be applicable. It was contended that there was here no case of election, because the husband brought no property into settlement. This argument is met by the observations of Vice-Chancellor *Wood* in *Barrow* v. *Barrow*, in which case also the only property settled belonged to the wife. His Lordship says (5): "The covenant was one and entire, to settle the property upon her for life, with remainder to her husband for life, with remainder to the children. She could not call upon her husband to perform it so far as to give her the first life estate, but to settle nothing in remainder on himself or on his children. His own life estate in remainder, and the remainder to his children, formed the benefits in consideration of which he covenanted to settle the property, and to forego that interest in the rents which the law gave him in right of his

(1) 35 Ch. D. 36.
(2) 13 App. Cas. 61.
(3) 22 Ch. D. 263.
(4) 4 K. & J. 109.
(5) 4 K. & J. 423.

wife." So here, the agreement is to settle the wife's property upon herself for life, with remainder as she should by deed or will appoint, and in default of appointment for her children, and if there should be none for her husband. The benefits thus secured to the children of the marriage and himself constitute the consideration for which he gave up a life estate in Mrs. *Greenhill's* real estate, and his right to her personal estate which might fall into possession during her coverture. Under these circumstances I think that the *Provident Society* acquired a good title to the policy, and that the action must be dismissed.

Solicitors for Plaintiffs: *Prior, Church, & Adams.*
Solicitors for Defendants: *Bircham & Co.*

G. A. S.

ATTORNEY-GENERAL *v.* HOOPER.

STIRLING, J.
1893
July 28; *Aug.* 3.

[1893 A. 54.]

Local Government—Improvement Commissioners—Jurisdiction—Projecting Signs affixed to Houses—Statutory Power to order Removal—Notice to Owner—Right of Owner to be heard before Order made—6 Will. 4, c. xxv. s. 82.

A local Act of Parliament appointing improvement commissioners for a town, provided that the occupiers of houses in the said town should, within fourteen days of receiving notice in writing from the commissioners, cause all signs and projections affixed to their houses, and which, in the judgment of the commissioners, should be considered public annoyances or nuisances by reason of their projecting into, or encroaching upon, or otherwise annoying or endangering the public passage along any of the streets within the said town, to be taken down or otherwise altered; and in case any occupier should neglect or refuse to comply with any such notice, then the commissioners might cause the sign or projection to be taken down or altered forthwith by any person acting under their authority:—

Held, that the commissioners, in exercising their discretion under the Act, were not bound to act as a court, and give the owner of the sign an opportunity of being heard before them previously to serving him with a notice to remove it, and that the proper course of the owner, if he objected

STIRLING, J
1893
ATTORNEY-GENERAL v. HOOPER

to the notice, was to give notice of his objection to the commissioners and require them to hear him upon it.

Cooper v. *Wandsworth District Board of Works* (1) and *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (2) considered.

MOTION.

This action was brought by the Attorney-General, at the relation of the commissioners for the carrying into execution of an Act for paving, lighting, cleansing, or otherwise improving the town of *Crediton*, in the county of *Devon*, and the said commissioners against *William James Hooper*.

The Plaintiffs claimed an injunction restraining the Defendant, his servants and agents, from interfering with the Plaintiffs, their servants and agents, in taking down, removing, and carrying away, or in any way preventing the Plaintiffs, their servants and agents, from taking down, removing, and carrying away, a certain sign, sign-iron, or projection affixed to or in front of a house occupied by the Defendant in *High Street, Crediton*, within the jurisdiction of the commissioners. The Act 6 Will. 4, c. xxv., under which the commissioners derived their authority, provided (sect. 82): "That the several and respective occupiers of the houses and other buildings situate in the several streets, roads, and public passages within the said town of *Crediton*, and every of them, are hereby authorized and required at their own respective costs and charges within fourteen days next after their respectively receiving notice in writing from the clerk, or other officer of the said commissioners, to cause all signs, sign-irons, sign-posts, barbers' poles, stalls, blocks, bulks, showboards, and other projections which now are, or hereafter shall be, in anywise affixed or set up against or in front of their respective houses or other buildings, and which in the judgment of the said commissioners shall be considered public annoyances or nuisances by reason of their projecting into or encroaching upon, or otherwise annoying and endangering the public passage along any of the streets within the said town of *Crediton*, to be taken down, removed, and carried away, or otherwise altered; and in case the occupier of any such house or other building as aforesaid shall neglect or refuse to cause any such sign, sign-iron . . . . which

(1) 14 C. B. (N.S.) 180. (2) 24 Q. B. D. 703.

shall be so considered an annoyance as aforesaid to be taken down, removed, and carried away, or otherwise altered, within such time and in such manner as in such notice shall be directed, then and in every such case it shall be lawful for the said commissioners to cause the same to be forthwith done by any person acting under their authority."

In 1890, the Defendant, who was a grocer, erected and fixed to the front of his house at a height of twenty-three feet from the ground an open ironwork sign bearing the words "*Hooper's Stores*" in large letters. This sign was of considerable weight, and projected over the whole of the footpath and partially into the roadway.

The commissioners at one of their ordinary monthly meetings, held on the 8th of August, 1892, having all seen the sign in question, and being of opinion that it was dangerous and an annoyance to the public, passed the following resolution: "Resolved, that notice be given to Mr. *William James Hooper*, of *High Street*, to remove within fourteen days the sign which he has placed in front of the house in his occupation in contravention of the local Act, and which in the opinion of the commissioners is annoying and dangerous to the public passing along the said street."

Acting upon this resolution, the clerk to the commissioners on the 5th of September, 1892, sent to the Defendant a notice in writing on behalf of the commissioners, and pursuant to the Act, to take down and remove the sign within fourteen days, and informing him that if he should neglect to do so the commissioners would cause the same to be forthwith done agreeably to the Act.

The Defendant, in a correspondence which ensued, disputed the jurisdiction of the commissioners; and he took no steps to comply with the notice.

On the 17th of November, 1892, the commissioners, after giving notice to the Defendant of their intention to do so, sent workmen with instructions to take down and remove the sign. The Defendant forcibly resisted its removal, and declared his intention of resisting by force any further attempt on the part of the commissioners to take down the sign.

STIRLING, J
1893
ATTORNEY-GENERAL v. HOOPER

On the 12th of January, 1893, this action was commenced, and the Plaintiffs now moved for an injunction. By consent the hearing of the motion was treated as the trial of the action.

The Defendant raised two objections, (1.) that the commissioners had not formed a judgment that the sign was a public annoyance or nuisance within the meaning of the Act; and (2.) that the action of the commissioners was contrary to the principles of justice, inasmuch as no notice was given to him of the matter being under the consideration of the commissioners before they passed the resolution in consequence of which the notice of the 5th of September, 1892, was sent to him, so that he had no opportunity of being heard to shew cause against the sign being adjudged by the commissioners to be a public annoyance or nuisance, or against a notice or order being given or made for its removal.

The first objection which turned upon the evidence, was decided against the Defendant, and calls for no report.

Hastings, Q.C., and *R. C. Glen*, for the Plaintiffs:—

The commissioners have properly exercised their jurisdiction under the Act, and ought not to be interfered with in putting their powers into force. They were not bound to act as a court and hear the Defendant before forming their judgment upon the sign: *Cheetham* v. *Mayor of Manchester* (1).

Beale, Q.C., and *Whitaker*, for the Defendant:—

The commissioners in exercising a discretion of this kind were bound to act judicially. They did not give the Defendant any opportunity of being heard before them upon the question whether the sign ought to be adjudged a public annoyance or nuisance within the meaning of the Act: *Tinkler* v. *Wandsworth District Board of Works* (2); *Goldstraw* v. *Duckworth* (3); *Hopkins* v. *Smethwick Local Board of Health* (4); *Cooper* v. *Wandsworth District Board of Works* (5); *Masters* v. *Pontypool Local Government Board* (6); *Lewis* v. *Weston-super-Mare Local Board* (7).

(1) Law Rep. 10 C. P. 249.
(2) 2 De G. & J. 261.
(3) 5 Q. B. D. 275.
(4) 24 Q. B. D. 712.
(5) 14 C. B. (N.S.) 180.
(6) 9 Ch. D. 677.
(7) 40 Ch. D. 55.

Hastings, in reply.

Aug. 3. STIRLING, J. (stated the facts, and continued):—

The Defendant objects that it will be contrary to the principles of justice if the commissioners are allowed to carry their resolution into effect, because he had no opportunity of being heard before it was passed. That objection was based upon several cases, of which *Hopkins* v. *Smethwick Local Board of Health* (1) is the most recent. In that case it was held that where a building has been erected in contravention of the by-laws of a local board of health the board cannot, under sect. 158 of the *Public Health Act*, 1875, pull down the building without giving the owner an opportunity of shewing cause why it should not be pulled down. That was decided by the Court of Appeal upon the authority of *Cooper* v. *Wandsworth District Board of Works* (2), which shews that the owner of the building in such a case should have an opportunity of shewing cause. It seems to me that the judgment of *Byles*, J., in that case, is important. He says (3): "This is a case in which the *Wandsworth* District Board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given: one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity." The law so laid down was considered by the Court of Appeal in the case of *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (4). That was a case under the *Metropolis Management Acts* of 1855 and 1862. It differs from the present one in this respect, that the respondent there had a right of appeal to the County Council, whereas under the Act in question here the Defendant has no such right, and it lies solely with the commissioners to say whether the projections are an annoyance or

(1) 24 Q. B. D. 712.
(2) 14 C. B. (N.S.) 180.
(3) 14 C. B. (N.S.) 194.
(4) 24 Q. B. D. 703.

STIRLING, J.

1893

ATTORNEY-GENERAL v. HOOPER.

not. But I do not think that this circumstance affects the application of the law laid down in *Cooper* v. *Wandsworth District Board of Works* (1) in any way. Lord *Coleridge*, in his judgment, says (2): "It is contended that there must be some opportunity of questioning the propriety of the order made by the vestry, and I agree that the case of *Cooper* v. *Wandsworth District Board of Works* is an authority for that proposition. Such an opportunity may be given in one of two ways- in the first place, before the vestry do anything they may give notice to the person whom they require to execute the works, and he may object; or, secondly, they may make the order, and if they do that they must give the person affected notice of such order. It is enough, if an opportunity is given of questioning the propriety of the order, and in the present case an opportunity was given, for the notice to execute the works was given on the 21st of September, but no summons was taken out until the 1st of November. Therefore, the respondent had abundant opportunity of calling in question the propriety of the order of the vestry, but he did nothing." The Master of the Rolls, in his judgment, says (3): "It is contended that the vestry is a judicial body, and that they were bound to hear the respondent in a judicial manner; but there are no words in the statute which entitle us to hold that the vestry is to act as a court. They may give notice of a hearing, that the party may be heard, as *Byles*, J., pointed out in *Cooper* v. *Wandsworth District Board of Works*; but he goes on to say there is another way in which they can proceed, namely, by giving notice of the order. The vestry must give notice of the order because there is a right of appeal within seven days. The party affected by the order can object to it"—that is, as I understand, he can object to the vestry—"or he has a right to appeal to the County Council. If the magistrate decided this case on the ground that the vestry were bound to hear the respondent judicially, I am of opinion that his decision was wrong. In the present case notice was given, and the respondent had the choice of two remedies; but he took neither, but disobeyed the order."

(1) 14 C. B. (N.S.) 180. (2) 24 Q. B. D. 709.
(3) 24 Q. B. D. 711.

They therefore held that the respondent's proper remedy, if he objected to the order of the vestry, was either by sending notice of his objection to that body or by appealing to the County Council; and, as he had not done so, the only questions for the decision of the magistrate were, whether the order of the vestry had, in fact, been made, and whether it had been disobeyed; and that if he decided those questions in the affirmative, he was bound to convict. That decision shews what ought to have been done in the present case. Under the terms of the Act, the commissioners were not bound to act as a court, but they were obliged to give the Defendant fourteen days' notice to remove his sign. If he objected to comply with the notice he should have asked them to allow him to be heard, and lay his objections before them, and if they had refused to do so, there might have been some reason for saying that they were acting contrary to justice. In what he did the Defendant has taken the wrong course. He refused to obey the order, and drove the commissioners to bring this action, in which he has gone into evidence to shew that the sign was not dangerous. That is not material unless I could come to the conclusion that the sign could by no means be dangerous to any one, and that the Plaintiffs had not exercised a *bonâ fide* judgment on the subject. So far is that from being the case, that there is, to say the least, a serious conflict of evidence on the point. Under these circumstances, the Plaintiffs are entitled to the injunction for which they ask.

Solicitors for Plaintiffs: *Coode, Kingdon, & Cotton*, agents for *James Wellington, Jun., Crediton.*

Solicitor for Defendant: *Edward Robinson*, agent for *Edwin J. Vine, Exmouth.*

G. A. S.

STIRLING, J.

1893

August 3, 8

In re BEAUMONT.

Domicil—Infant—Fatherless Infant—Change of Mother's Domicil.

The change in the domicil of a fatherless infant which may follow from a change of domicil on the part of the mother is not to be regarded as the necessary consequence of a change of the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising even when she changes her own domicil.

Mrs. *B.*, a widow with several infant children, all of whom had a Scotch domicil, married again in *Scotland* in November, 1834. In January, 1835, Mr. *N.*, her second husband, went to reside permanently in *England*, and shortly afterwards Mrs. *N.* and all her children, except *C. B.*, joined him in *England* and acquired an English domicil. *C. B.* remained in *Scotland* with an aunt, with whom she had lived since her father's death in 1821. *C. B.* attained twenty-one in May, 1840, and she died in *Scotland* in April, 1841:—

Held, that *C. B.'s* mother had abstained from exercising her power of changing *C. B.'s* domicil when she changed her own, and that the domicil of *C. B.* at the time of her death was Scotch.

Potinger v. *Wightman* (1) discussed and explained.

PETITION.

This was a petition for the distribution of a sum of Consols and cash in Court representing the fund remaining subject to the trusts of a settlement dated the 16th of December, 1816, and made upon the marriage of *Henry Beaumont* and *Lucy Smith*.

Catherine Atkinson Beaumont, one of the children of this marriage, had died a spinster and intestate, being at the time of her death entitled under the trusts of this settlement to a share in the trust funds comprised therein; and upon the hearing of this petition it was necessary for the Court to decide how that share should be dealt with.

The question depended upon whether *Catherine Atkinson Beaumont*, at the time of her death, was domiciled in *Scotland* or in *England*, for, if her domicil was Scotch, neither her mother nor her brothers or sisters of the half-blood would be entitled to share in her estate under the law then in force in *Scotland*.

Henry Beaumont and *Lucy Smith*, her father and mother, were both domiciled in *Scotland*, and their marriage took place on the

(1) 3 Mer. 67.

27th of December, 1816. After the marriage they resided in *Scotland*, and they had four children, of whom *Catherine Atkinson Beaumont* was born in *Scotland* on the 8th of May, 1819.

Henry Beaumont died in *Scotland* on the 24th of December, 1821, leaving his widow *Lucy Beaumont*, his daughter *Catherine Atkinson Beaumont*, and his three other children him surviving; and Mrs. *Beaumont* and her children continued to reside in *Scotland*.

On the 5th of November, 1834, Mrs. *Beaumont* married Mr. *David Hume Nelson*, then a domiciled Scotchman. Mr. and Mrs. *Nelson* and Mrs. *Nelson's* children remained in *Scotland* down to January, 1835. In that month Mr. *Nelson* went to *London* with the intention to permanently reside and establish himself in *England* as a medical practitioner. Shortly after his arrival in *England* his wife and her three children, other than *Catherine Atkinson Beaumont*, joined him in *England*, and they acquired an English domicil.

Catherine Atkinson Beaumont, however, from the time of her father's death in 1821 lived with, and was brought up and maintained by and at the expense of, an aunt of hers in *Edinburgh*, only going to *England* on occasional visits to her mother, and she died in *Scotland* on the 9th of April, 1841, a spinster and intestate.

Under these circumstances the question arose whether the change in the mother's domicil had operated to change the original Scotch domicil of the daughter.

There was issue of the marriage of Mr. and Mrs. *Nelson* one daughter. Mrs. *Nelson* died on the 14th of December, 1871, and this petition was presented by Mr. *Nelson*, who alleged that the domicil of *Catherine Atkinson Beaumont* was English, that he, in right of his late wife, as mother, and his daughter, as sister by the half-blood of *Catherine Atkinson Beaumont*, were entitled to participate in her share of the trust fund.

The fund had not been dealt with for over fifteen years, and the petition was accordingly served upon the official solicitor.

Hastings, Q.C., and *W. Higgins*, for the Petitioner, Mr. *Nelson*:—

The original domicil of *Catherine Atkinson Beaumont* was no

STIRLING, J.
1893
In re BEAUMONT.

doubt Scotch; but if after the death of the father of an infant child its mother acquires a new domicil, the domicil of the infant changes with that of the mother. This is the result of the authorities; and it is obviously convenient that the domicil of an infant should be that of its surviving parent: *Potinger* v. *Wightman* (1); *Ryall* v. *Kennedy* (2); *Dicey* on Domicil (3); *Story's* Conflict of Laws (4). The domicil of *Catherine Atkinson Beaumont* at the time of her death was, therefore, an English one, and according to English law her father, as the legal personal representative of her deceased mother, and her sister of the half-blood, are entitled to participate in her share of the fund.

Johnston Edwards, for the daughter of Mr. *Nelson*, supported the same contention.

Upjohn, for *Margaret Beaumont*, the executrix of a deceased child of Mrs. *Nelson's* first marriage:—

Catherine Atkinson Beaumont did not accompany her mother to *England*, but remained in *Scotland*, merely paying occasional visits to her mother. This case is not within the principle of *Potinger* v. *Wightman*, for there the change of domicil was the act of the mother, and the children remained under her care: *Johnstone* v. *Beattie* (5). *Ryall* v. *Kennedy* shews that the domicil of an infant does not follow that of its stepfather. Here nothing has occurred to alter the Scotch domicil of *Catherine Atkinson Beaumont*, and her share must be dealt with accordingly: *Urquhart* v. *Butterfield* (6).

Warlters Horne, for the trustees of the will.

Methold, for the official solicitor.

Hastings, in reply.

(1) 3 Mer. 67.
(2) 40 New York (Sup. Ct.) 347, 360.
(3) Page 97.
(4) 8th Ed. p. 48, note c.
(5) 10 Cl. & F. 42.
(6) 37 Ch. D. 357, 377.

Aug. 8. STIRLING, J.:—

This petition raises a question of some interest upon the subject of domicil. The facts are few and undisputed. [His Lordship then referred to the facts of the case, and continued:—]

In *Potinger* v. *Wightman* (1) it was held that where the widow of a person domiciled in *Guernsey* brought her children to *England* after her husband's death, and herself gained a domicil in *England*, the domicil of the children became English likewise. In his judgment, Sir *W. Grant* says this (2): "Here the question is, whether, after the death of the father, children remaining under the care of the mother, follow the domicil which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favour of the former proposition. It has the sanction both of *Voet* and *Bynkershoek*; the former however qualifying it by a condition that the domicil shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession. *Pothier*, whose authority is equal to that of either, maintains the proposition as thus qualified. There is an introductory chapter to his Treatise on the Custom of *Orleans*, in which he considers several points that are common to all the customs of *France*, and, among others, the law of domicil. He holds in opposition to the opinion of some jurists, that a tutor cannot change the domicil of his pupil, but he considers it as clear that the domicil of the surviving mother is also the domicil of the children, provided it be not with a fraudulent view to their succession that she shifts the place of her abode. And he says, that such fraud would be presumed, if no reasonable motive could be assigned for the change." That decision was treated as binding by the House of Lords in the case of *Johnstone* v. *Beattie* (3). The Lord Chancellor (Lord *Lyndhurst*) in that case said (4): "The case of *Potinger* v. *Wightman* appears to have been well argued and well considered, and must be held conclusive as to the mother's power to change the domicil—which is a novel point in the law of *England*—unless there is some opposite decision." It is

(1) 3 Mer. 67.
(2) Ibid. 79.
(3) 10 Cl. & F. 42.
(4) Ibid. 66.

STIRLING, J.

1893

In re BEAUMONT

to be observed that the Lord Chancellor speaks there of the mother's power to change the domicil. Lord *Campbell* says (1): "I think that the case of *Potinger* v. *Wightman* (2) must be taken conclusively to have settled the general doctrine, that if after the death of the father an infant lives with her mother, and the mother acquires a new domicil, it is communicated to the infant."

Potinger v. *Wightman* is the only authority on the point; but it does not cover the present case in two respects—first, there the change of domicil took place, as I understand the facts, before the second marriage of the widow; and, secondly, the children were taken by the widow from the old to the new place of domicil.

Sir *W. Grant* based his decision on the authority of *Voet*, *Bynkershoek*, and *Pothier*. It appears from the extract from *Pothier* (3), that in the opinion of that jurist the power of the mother to change the domicil of the children is confined to her widowhood. The like view is expressed by Mr. *Burge*. He says (4): "It is, however, only during the mother's widowhood that she could change the domicil of her infant."

The law is thus stated in the American case of *Ryall* v. *Kennedy* (5): "The domicil of an infant follows that of its father. If the father dies it follows, in the absence of fraud, that of its mother until such time as the mother remarries, when, by reason of her own domicil becoming subordinate to that of her husband that of the infant ceases to follow any further change by the mother, or, in other words, it does not follow that of its stepfather (6)." This appears, however, to have been in the nature of a *dictum* not necessary for the decision of the case.

There is another American case in which the point seems to have arisen for decision—*Brown* v. *Lynch* (7). The head-note in that case is this: "Where the parents resided and were married in the State of *Connecticut*, and the child was born there, the father having previously removed to *New York*, where the mother,

(1) 10 Cl. & F. 138.
(2) 3 Mer. 67.
(3) Ibid. 76.
(4) Burge's Col. Law, vol. i. p. 39.
(5) 40 New York (Sup. Ct.) 347.
(6) Ibid. 360.
(7) 2 Bradf. Surrogate Rep. (N. Y.) 214.

after the birth of her infant, joined him :—*Held*, that the original domicil of the minor was that of his parents at the time of his birth.

"On the death of the father, the establishment in *New York* having been broken up, and the mother, with her child, removed to the residence of her parent in *Connecticut* :—*Held*, that the domicil of the minor was changed to that State.

"The mother having married again, and left *Hartford* to reside at *New York* with her husband :—*Held*, that although by marriage she adopted the domicil of her husband, the domicil of the child was not thereby changed.

"The mother, after the father's death, may change the domicil of her children, provided it be without fraudulent views to the succession of the estate. The domicil of the children does not necessarily follow that of the surviving mother; for, although changing her own, she may, from wise motives, refuse to alter that of the child. The presumption, however, is, that their domicil follows hers. But this rule does not obtain on the second marriage of the mother. By that act she acquires the domicil of her husband, and loses all power to control that of her children."

In the judgment there is this passage (1): "But she marries again, and leaves *Hartford* to reside at *New York* with her husband. It is a universal maxim that the wife takes the domicil of the husband: Digest, 50, 1, 37; Code, 12, 1, 13, 10, 40, 9; *Warrender* v. *Warrender* (2). But was the residence of the minor changed by that act? In the first place, if it were true that the domicil of the minor follows that of the surviving mother, *on her second marriage*, it seems to me plain that it is not a matter of legal necessity. The mother is not *compelled* to change the residence of her child. She may, from wise and prudential motives respecting the comfort, happiness, or education of her offspring, determine not to change his residence. And if such determination be evinced and acted upon, the inference that might be drawn, that the domicil of the child followed that of the parent, is rebutted and destroyed. The ordinary presumption of law (if it existed in such a case), would give way

(1) 2 Bradf. Surrogate Rep. (N.Y.) 217. (2) 9 Bli. N. S. 89.

STIRLING, J.

1893

In re BEAUMONT

before express and positive acts subversive of all inferences and presumptions. If, while the mother continues in her widowhood, it is within the scope of the parental authority, when she changes her own domicil, not to change that of her child, the moral reasons for such a power would be much stronger in the event of a second marriage, supposing she still retained any capacity to effect a change of her own domicil. But she does not. By the act of marriage she takes the domicil of the husband; and to hold that the domicil of the child is drawn after hers, would be to establish an arbitrary train of sequences unsupported by reason. The mother subjects herself to the control of another husband, and adopts his home; and when she ceases to occupy an independent position as the head of the family, she cannot delegate to another a personal trust residing in her for the welfare of her children. I have no hesitation in saying that the proposition is unsound, which maintains as a necessary legal consequence that the domicil of the child follows that of the stepfather."

In the present case, *Catherine Beaumont's* domicil of origin was Scotch. Her residence was in *Scotland* from her birth to her death, the only exception being the occasional temporary visits to her mother in *England* referred to in the evidence. She lived nine months after attaining twenty-one, and still remained in *Scotland.* Under these circumstances she retained her domicil of origin, unless the law be that the domicil of an infant whose father is dead necessarily follows that of the mother. Even so, the continued residence of *Catherine Beaumont* in *Scotland* after she attained twenty-one would be evidence of an intention on her part to reside there permanently; but without further information as to the facts, I am not quite satisfied that the case ought to be decided on that ground. There is a considerable weight of authority for the proposition that where the mother of infant children remarries, their domicil ceases to follow hers: if that be so, then the domicil of *Catherine Beaumont* remained Scotch. I think, however, that the better view is that the change in the domicil of an infant which, as is shewn by the decision in *Potinger* v. *Wightman* (1), may follow from a change of domicil

(1) 3 Mer. 67.

on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising, even when she changes her own domicil. I agree with the remark of Mr. *Dicey* (*Dicey* on Domicil (1)): "It is reasonable to hold, that the fiction which assigns to a woman on marriage the domicil of her husband should not be extended, so as necessarily to give to step-children the domicil of their stepfather; but it is less easy to see why it should be held, that a widow, on remarriage, loses all control over the domicil of her infant children, born during her first marriage."

In the present case, I think the mother abstained from exercising this power. *Catherine Beaumont* was not left in *Scotland* for any temporary purpose, such as education; upon the evidence her home was there with her aunt, not in *England* with her mother. In my opinion, therefore, her domicil was Scotch.

Solicitors: *Richard Ballard; Travers Smith, Braithwaite, & Robinson; J. D. B. Lewis; Pollock & Co.; The Official Solicitor.*

(1) Page 103.

W. W. K.

KEKEWICH, J.

1893

June 14, 22; *July* 1

In re ANTHONY. ANTHONY *v.* ANTHONY.

[1891 A. 374.]

Administration — Exoneration of Personal Estate — Judgment Debt — Land belonging to Tenant in Tail delivered in Execution—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *ss.* 11, 13—*Real Estate Charges Acts* (*Locke King's Acts*), (17 *&* 18 *Vict. c.* 113; 30 *&* 31 *Vict. c.* 69).

Land belonging to a tenant in tail in possession was delivered in execution to judgment creditors of his under a writ of *elegit.* The judgment debtor died, and gave no direction exonerating his personal estate from payment of the debt :—

Held, that, as the *Real Estate Charges Acts* were not applicable, the judgment debt was not chargeable on the land in exoneration of the personal estate.

Jenkinson v. *Harcourt* (1) distinguished.

ADJOURNED SUMMONS.

Land at *Boreham* in *Essex,* belonging to *John Hollis Anthony,* was, previously to his death, delivered in execution to judgment creditors of his under a writ of *elegit* which was duly registered under the *Land Charges Registration and Searches Act,* 1888 (51 & 52 Vict. c. 51).

John Hollis Anthony died on the 13th of February, 1890, having by his will devised the land, and this action was brought for the administration of his real and personal estate.

On the hearing of the action, as already reported (2), it was supposed that *John Hollis Anthony* was entitled to the whole of the land absolutely as tenant in fee simple, and on that assumption the Court decided that the *Real Estate Charges Acts* were applicable to the case, and that the devised land was primarily liable for the judgment debt in exoneration of the testator's personal estate.

It was now ascertained that the land, which was part freehold and part copyhold, had devolved on *John Hollis Anthony* as tenant in tail in possession under a settlement, and that previously to the delivery of the land in execution he had barred

(1) Kay, 688. (2) [1892] 1 Ch. 450.

the estate tail in the freehold portion, but not in the copyhold portion, which on his death devolved in the first instance on his brother *William Hollis Anthony* as next tenant in tail under the settlement, and then upon the death of *William Hollis Anthony*, intestate and without having barred the entail, on *Henry William Anthony*, his eldest son, as issue in tail.

The judgment debt had been paid out of the personal estate. The Plaintiff, who was the executor and one of the residuary legatees, contended that the copyhold land in the hands of *Henry William Anthony* was primarily liable for the judgment debt in exoneration of the personal estate, and took out the present summons asking that *Henry William Anthony* might be ordered to execute a proper disentailing assurance.

The will and codicil of the testator (the terms of which are stated in the previous report) contained no express direction exonerating the personal estate of the testator from payment of the judgment debt.

Vernon R. Smith, for the Plaintiff, in support of the summons:—

The judgment creditors having been paid out of the personal estate, it is submitted that the persons beneficially interested in the personal estate are entitled to stand in their place as against the copyhold estate, which was charged with the judgment debt. As the copyholds devolved, not under the will, but under the entail, the *Real Estate Charges Acts* (commonly known as *Locke King's Acts*) have no application; but by the *Judgments Act*, 1838, s. 13, a writ of *elegit* is binding, not only against the judgment debtor and his issue, but against "all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest," and the creditor has the same right to enforce the charge as he would have had if the debtor had power to charge the land, and had by writing agreed to charge the same with the amount of the judgment debt and interest. There was, therefore, at the time of the testator's death, a charge in favour of the judgment creditors in exactly the same way as if the testator, being absolute owner, had agreed to charge the property in their favour. It would have been for the benefit of the

KEKEWICH, J.
1893
In re ANTHONY. ANTHONY v. ANTHONY

testator's estate that the charge should fall on the copyholds, which would pass from him at his death, rather than on property of which he had power to dispose by his will, and he must, therefore, be taken, consistently with the principle of *Jenkinson* v. *Harcourt* (1), to have charged the copyholds in exoneration of his personal estate. In that case the testator had mortgaged certain property in execution of a power contained in a voluntary settlement made by himself, and by his will he created charges by annuity and confirmed the settlement, but did not expressly direct an exoneration of his personal estate, and it was held that the settled property was, as between the persons entitled thereto and the personal representatives of the settlor, the primary fund for payment of the mortgage debt.

The tenant in tail, *Henry William Anthony*, ought, therefore, to be directed to execute a proper disentailing assurance: *Lewis* v. *Duncombe* (2).

C. E. E. Jenkins, for the executor and one of the residuary legatees, adopted the same arguments, and, upon the question whether the tenant in tail was put to election under the will, referred to *Pickersgill* v. *Rodger* (3); *Streatfield* v. *Streatfield* (4); *Whistler* v. *Webster* (5).

Warrington, for *Henry William Anthony*, the tenant in tail:—

As the *Real Estate Charges Acts* have no application, the case must be determined according to the general law; and, in the absence of any direction in the will to the contrary, the general personal estate must be the primary fund for payment of the judgment debt. *Jenkinson* v. *Harcourt* has no application to the present case. That was a case in which a testator raising money threw the charge on certain land. Here the charge was, as against the testator, *in invitum*. The debt was the debt of the testator, and *Henry William Anthony* is, therefore, simply in the position of a man whose property is taken as security for the debt of another—that is, he is in the position of a surety for the

(1) Kay, 688.
(2) 20 Beav. 398.
(3) 5 Ch. D. 163.
(4) 1 W. & T. L. C. Eq. 6th Ed. p. 397.
(5) 2 Ves. 367, 371.

testator, and entitled to be indemnified out of the testator's estate. The other points raised in argument are not now properly before the Court.

Vernon R. Smith, in reply.

July 1. KEKEWICH, J.:—

The discovery since this case was last before me, that as regards part of the property *Henry William Anthony* succeeded thereto, not as heir of his father, but as tenant in tail under an old settlement, does not otherwise affect my decision (1), but renders it inoperative as regards this particular item. Even as regards that, the decision stands to this extent, that the judgment debt is charged thereon. The language of the statute 1 & 2 Vict. c. 110, s. 13, expressly extends to land of which the judgment debtor is tenant in tail, and the charge is enforceable against successors in title not claiming through him, but under a prior settlement. There is no longer any room for the application of *Locke King's Acts*, which operate only between the persons taking through the debtor his real and personal estate; but the question arises whether, apart from these Acts, the charge is enforceable as against the estate tail to the exoneration of the testator's personalty.

The argument in support of the claim that it is so enforceable was based on *Jenkinson* v. *Harcourt* (2), it being contended that as, according to the words of the statute, the judgment debtor must be taken to have agreed to charge this property with the judgment debt, the inference is that he intended to do so in exoneration of his personal estate. It must, so the argument runs, have been to his benefit to make the charge on that which would pass from him on his death, rather than on that which would remain subject to his testamentary disposition, and the Court must give effect to his presumed intention to do that which was best for his own estate. It would, I think, be straining the doctrine of *Jenkinson* v. *Harcourt* too far to extend it to a charge effected, not by any act of the debtor postulating an exercise of his will, but by a statutory provision attributing to

(1) [1892] 1 Ch. 450. (2) Kay, 688.

KEKEWICH, J.
1893
In re ANTHONY ANTHONY *v.* ANTHONY.

the intervention of a stranger an agreement by the debtor into which he never in fact entered. The summons asks that the tenant in tail may be directed to execute a proper disentailing assurance of the property in question. There is authority (*Lewis* v. *Duncombe* (1)) for this being done, and, had the Applicant's case been established, I should, of course, have followed that authority, notwithstanding a doubt (on which I will not enlarge) whether a disentailing assurance is necessary.

For the reasons above given it ought not in my opinion to be directed here.

On the hearing of the summons some further points were partially argued; but I uphold Mr. *Warrington* in saying that they were not properly before me, and could not conveniently be disposed of on the available materials. The summons is refused with costs.

Solicitors: *Patersons, Snow, Bloxam, & Kinder*, agents for *Gayton & Hare, Much Hadham; Shaen, Roscoe, Massey & Co.; Torr, Janeway & Co.*, agents for *Anthony & Imlach, Liverpool.*

C. C. M. D.

KEKEWICH, J.
1893
June 24, 27, *July* 1.

In re SHEWARD. SHEWARD *v.* BROWN.

[1893 S. 1053.]

Will—Life Interest—Forfeiture on Alienation—Assignment, or Attempted Assignment—Literal Meaning of Document not in conformity with real Intention of Parties.

By a will a fund was bequeathed in trust for one for life, with a gift over in case he should "assign, charge or incumber, or attempt or affect to assign, charge or incumber" his interest in the income. On the occasion of a loan to him, he signed in favour of the lender a document which amounted in terms to an equitable assignment of his interest in the income. Notice of the document was not given to the trustees of the will, and it was subsequently destroyed by the lender. It was proved that as between the tenant for life and the lender the document was not

(1) 20 Beav. 398.

intended as a charge or assignment, and that it would have been a fraud on the bargain between them so to use it.

Held, on the evidence, that the document could have been set aside for fraud or mistake, that it was therefore competent for the Court to go behind the literal meaning, and, consequently, that there had not been a forfeiture of the life interest.

SAMUEL BRISCOE SHEWARD, who died on the 9th of March, 1887, by his will dated the 18th of June, 1883, after making certain specific bequests, gave and bequeathed the sum of £30,000 unto his wife *Ellen Elizabeth Sheward* and *Thomas Sismey* upon trust that they should invest the same as therein mentioned, and pay the dividends and income thereof to *George Sheward Brown* for his life, or until he should be outlawed or become a bankrupt, or enter into any composition with his creditors, or should assign, charge or incumber, or attempt or affect to assign, charge or incumber, the said dividends and income or some part thereof, or should do or suffer something whereby the same or some part thereof would through his act or default or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons, and after the failure or determination of the trust thereinbefore declared of the said dividends and income in favour of *George Sheward Brown*, if the same should fail or determine in his lifetime, should, if the trustees or trustee for the time being should in their or his absolute discretion think fit, but not otherwise, pay and apply such dividends and income or any part thereof in their or his discretion, as the same should become payable, and without anticipation, for or towards the maintenance and personal support of the said *George Sheward Brown* and his wife (if any) and child or children, and any other issue for the time being in existence, or at the discretion of the said trustees or trustee for or towards the maintenance and personal support of one or more to the exclusion of the others or other of such objects, and after giving directions for the accumulation of unapplied income, and that the accumulations thereof should be added to capital, the testator directed his trustees after the death of the said *George Sheward Brown* to pay the dividends and income of one moiety of the trust fund to the

KEKEWICH, J.
1893
In re SHEWARD, SHEWARD v BROWN

widow of the said *George Sheward Brown* for her life for her sole and separate use as therein mentioned; and subject to the trusts aforesaid, the testator directed his trustees to stand possessed of the trust fund and the dividends and income thereof upon trust for the children of the said *George Sheward Brown* as therein mentioned. The testator left a further sum of £20,000 to his trustees upon trust for his wife *Ellen Elizabeth Sheward* for life, and after her decease, in case the said *George Sheward Brown* should survive her or leave any child or children him surviving, upon similar trusts to those declared as to the said sum of £30,000.

On the 7th of January, 1892, *George Sheward Brown* married, and there was issue of the marriage one child, *Mary V. Brown*, an infant.

On the 6th of July, 1892, *George Sheward Brown* and his wife signed and gave to Mr. *H. V. Long*, on the occasion of a loan by him to *George Sheward Brown*, a document referring to the testator by name, and addressed to the trustees of the will in the following terms: "Please pay the income arising from the investments representing the sum of £30,000, to which I am entitled under the will of the above-named deceased, due the months of January and July, 1893, to Mr. *Harry Vince Long*, of 10, *Adam Street, Strand*, whose receipt, together with this authority, shall be your discharge for the same. Dated the 6th day of July, 1892.—*George Sheward Brown; Caroline Brown.*"

It appeared that on the occasion of a previous loan from *Long* to *George Sheward Brown* a mortgage of the interest of the latter under the will had been prepared; but his solicitor on seeing the will advised him that he could not mortgage his interest.

When called upon to sign the document of the 6th of July, 1892, *George Sheward Brown* inquired as to its nature and effect, and the explanation given to him on the part of *Long* was that the document was required in order that, in case anything should happen to Mr. and Mrs. *Sheward Brown*, it might be produced to the trustees as evidence that the debt was properly due.

The document, though addressed to the trustees, was not formally served upon them, and the trustees first became aware of it about the 13th of March, 1893.

Long subsequently cancelled the document, and on the 3rd of May, 1893, he wrote to *George Sheward Brown's* solicitors inclosing the cancelled document, and stated that it had never been out of his possession, or acted upon in any way whatever. He further stated that it never was intended that it should operate as a charge or incumbrance, or as any alienation of *George Sheward Brown's* life interest under the will. There was further evidence to shew that as between *George Sheward Brown* and *Long* the document was not intended as a charge or assignment, and that it would have been a fraud on the bargain between them so to use it.

An action of *Brown* v. *Long* had been instituted, and was pending by *George Sheward Brown* against *Long* for the purpose of reducing the amount of the loan by *Long* and obtaining a declaration that a mortgage executed in his favour should stand as security only for the amount actually advanced, with interest at 5 per cent.

This was an originating summons taken out by the trustees, and served on Mr. and Mrs. *Sheward Brown* and their infant child, to determine the questions (1.) whether the direction or authority dated the 6th of July, 1892, addressed to the trustees of the will, was an assignment or attempted assignment by *George Sheward Brown* so as to determine the trust declared by the will of the income of the £30,000 in his favour, and to give rise to the discretionary trust vested in the trustees under the will to apply the said income, and (2.) whether the trusts in favour of *George Sheward Brown* under the will expectant on the decease of *Ellen Elizabeth Sheward* of the sum of £20,000 were affected by the said direction or authority.

Ingpen, for the trustees, stated the facts.

Warmington, Q.C., and *Ingle Joyce*, for Mr. and Mrs. *Sheward Brown*:—

The document of the 6th of July, 1892, was neither an assignment nor an attempt to assign. It was merely intended to be used, if at all, as evidence that there had been an advance made by Mr. *Long* to Mr. and Mrs. *Sheward Brown*. There cannot be

KEKEWICH, J.
1893
In re SHEWARD SHEWARD v. BROWN

an equitable assignment contrary to the intention of the parties; and here the evidence is conclusive that no one intended that there should be an assignment. If there had been no forfeiture clause, and Mr. *Long* had attempted to use this document to work an equitable assignment, Mr. and Mrs. *Sheward Brown* would have been entitled to an injunction to restrain him from any such use. There was no valid contract to effect an incumbrance, and therefore no assignment. Nor could it be an attempt to assign, because an assignment was the one thing of all others which the parties desired to avoid.

Renshaw, Q.C., and *F. A. Milne*, for the infant child:—

The document of the 6th of July, 1892, was an equitable assignment by Mr. and Mrs. *Brown* to Mr. *Long* within the meaning of the will, and therefore worked a forfeiture of the life interest. It is immaterial that notice was not given to the trustees of the will; the giving of notice is unnecessary as between assignor and assignee, though it may be important as regards the priorities of assignees: *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1). The document has all the elements of an equitable assignment within the meaning of the authorities: *Oldham* v. *Oldham* (2); *Wilkinson* v. *Wilkinson* (3). The reason for the giving of it alleged by Mr. *Long* is obviously not the true one. It was really given because he desired to obtain some advantage.

Further, whether the document was or was not an equitable assignment, it is clear that the giving of it constituted an "attempt to assign" within the meaning of the forfeiture clause: *In re Porter* (4); *Hurst* v. *Hurst* (5). By giving to *Long* a document which he could have converted into a complete assignment by giving notice to the trustees, Mr. *Sheward Brown* attempted to make an equitable assignment of the income accruing during the two months of January and July, 1893.

Warmington, in reply:—

The forfeiture clause does not prevent the Court from getting

(1) 34 Ch. D. 128.
(2) Law Rep. 3 Eq. 404.
(3) 3 Sw. 515.
(4) [1892] 3 Ch. 481.
(5) 21 Ch. D. 278, 287.

at the truth of the transaction. It is clear, that any attempt by *Long* to make use of the document as an assignment would have been a fraud on the bargain between the parties. There cannot be an attempt to do an act without an intention to do it, for a man cannot attempt unwittingly; and there cannot be an attempt to assign without an intention on the part of the assignor. It is immaterial, therefore, what was the intention of Mr. *Long* in taking the document; it is sufficient that Mr. *Sheward Brown* did not intend to make an assignment. All the cases cited are distinguishable on this ground of want of intention.

July 1. KEKEWICH, J.:—

The document of the 6th of July, 1892, is certainly an assignment, or an attempt to assign, within the meaning of the will. The inquiry whether it may more properly be described as the one or the other would be merely academical and may be dismissed. Nor will I pause to examine or compare the language of Mr. Justice *Fry* in *Hurst* v. *Hurst* (1), and Mr. Justice *North* in *In re Porter* (2). Suffice it to refer to the passage in Lord Justice *Lindley's* judgment in *Hurst* v. *Hurst* (3), where he says: "A proviso prohibiting the charging a life estate means in fact to prohibit anything purporting to charge it." The document really operates as an equitable assignment. This is conformable to the doctrine of *Wilkinson* v. *Wilkinson* (4), and of many other cases; for instance, *Burn* v. *Carvalho* (5), before Lord *Cottenham*, and *Rodick* v. *Gandell* (6), before Lord *Truro*. The authority of *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (7) was not required to establish that notice to the trustees of the will is not necessary to complete the assignment, and that point was not contested.

But it is argued, that an equitable assignment can only operate according to the intention of the parties; and that to give it any other effect would be to permit a fraud. The intention here pointed out is, of course, external to the instrument itself, an

(1) 21 Ch. D. 278.
(2) [1892] 3 Ch. 481.
(3) 21 Ch. D. 296.
(4) 3 Sw. 515.
(5) 4 My. & Cr. 690.
(6) 1 D. M. & G. 763.
(7) 34 Ch. D. 128.

KEKEWICH, J.
1893
In re SHEWARD.
SHEWARD v. BROWN

intention beyond and possibly in contravention of that deducible from the instrument properly construed, and such a position must therefore be approached with exceeding caution, especially as the question falling for decision is not capable here of being tried between the parties to the contract—that is, between him who gave the charge and him to whom it was given. No authority was cited in support of this position, nor am I aware of any so directly bearing on it as to be useful for reference. There is some objection to deciding the question on principle, because, as already remarked, it does not arise between the contracting parties, and, moreover, the method of proceeding—summons by the trustees of the will—is not well adapted to the purpose. On the other hand, the document has been cancelled by Mr. *Long* himself, so that if he were here he could not argue in maintenance of its validity, and no injustice can be done to him by pronouncing it invalid. All other parties concerned are before me, and I have had the advantage of that thorough argument on behalf of the infant without which decision would have been impossible. There is another observation to be made in this connection. The accident of the pending litigation in *Brown* v. *Long* has supplied all the evidence that could be reasonably expected to be forthcoming on the point now under consideration, and no advantage in the way of additional or more satisfactory evidence could be anticipated if it were thought right to insist on the point being raised and decided in other proceedings. It may therefore be properly decided now.

What I have to consider is, not whether the document meant what its language imports, but whether operation can in conscience be given to that meaning. In other words, if Mr. *Sheward Brown* had been Plaintiff in an action to set aside the document on the ground of mistake or fraud, could Mr. *Long* have successfully resisted judgment? My conclusion from the evidence is that Mr. *Sheward Brown* did not intend to charge his life interest, and cannot be taken to have consented to sign a document of that purport—that is, that he cannot be taken to have given his deliberate assent thereto. He had been warned on the occasion of the first loan that he could not mortgage his interest under the will, and though possibly, and indeed pro-

bably, he did not attribute any definite legal meaning to the term "mortgage," and certainly had not fathomed the mysteries of equitable assignment, yet the warning given was present to his mind on the occasion of the second loan, as is obvious from the inquiry made respecting the nature and effect of this particular document when called upon to sign it. That he was imprudent, and under the pressure of the moment accepted an unsatisfactory explanation, is abundantly clear; but I cannot hold him to have intended to do what he had been told was, and he believed to be, impossible. The reasonable inference from the evidence is that he would have declined to sign this document if the true nature thereof had been explained to him. That Mr. *Long* did not intend the document to be what it is is not so clear. He also knew that Mr. *Sheward Brown* could not mortgage his interest. He also must be credited with something short of full acquaintance with the equitable doctrines affecting the matter in hand; but he may have thought that the document, even if equivalent to a mortgage, and from that point of view futile, would be useful for some purpose, not of course that avowed, which is obviously incorrect, but some other purpose not definitely present to his mind. But I cannot credit Mr. *Long* with such folly as would be implied in the intention that the document should operate as a charge which would cut off Mr. *Sheward Brown's* income, and with it his means of making any payment to Mr. *Long*. Here comes in an observation made by Mr. *Warmington* in reply, which is entitled to considerable weight. He almost used the language of Lord *Truro* in *Rodick* v. *Gandell*, which is worth quoting in this connection. He says (1): "Although it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the party from whom the debt is due, yet it is most usual and very expedient for the safety of the assignee that it should be done, and the omission to give any such notice may operate as strong moral evidence of the intention and understanding of the parties."

On the whole, after careful study and reflection, I have come to the conclusion that as between Mr. *Sheward Brown* and Mr.

(1) 1 D. M. & G. 780.

KEKEWICH, J.
1893
In re SHEWARD SHEWARD *v* BROWN.

Long, the document of the 6th of July, 1892, was not intended as a charge on Mr. *Sheward Brown's* interest under the will, that it would have been a fraud on the bargain so to have used it, and that any attempt by Mr. *Long* to use it in that manner would, on the evidence now before me, have been restrained by injunction. It seems to me legitimate thus to go behind the document, and to hold that the literal meaning is not according to truth and honesty, and must not be regarded as expressing any real contract between the parties.

The result is that the first question asked by the summons must be answered in the negative. I hardly know why the second question was asked at all, for there is no evidence of any kind respecting any assignment or attempt to assign Mr. *Sheward Brown's* interest in the £20,000, but that may also be answered in the negative. It would be wrong to throw the costs of these proceedings, occasioned by Mr. *Sheward Brown's* imprudence, on the capital of the trust fund, or on anything but his life interest. They must be paid by the trustees out of income.

Solicitors: *Kingsford, Dorman & Co.; Sismey & Sismey; Rowcliffes, Rawle & Co.*

C. C. M. D.

KEKEWICH, J.
1893
July 21.

RICHARDSON *v.* METHLEY SCHOOL BOARD.

[1893 R. 1350.]

Jurisdiction—Injunction—Legal Remedy—Quo Warranto—Personal Status—School Board Member—Absence from Meetings for Six Months—Illness—Disqualification—Election of New Member—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *Sched. II., Part. I., r.* 14.

Where, independently of the *Judicature Act*, 1873, s. 25, sub-s. 8, there is a legal right which can be asserted either at law or in equity, a Court of Equity has jurisdiction under that sub-section to grant an injunction in protection of that right. For instance, where a member of a school board has been improperly declared disqualified for the office, he may apply for and obtain an injunction from a Court of Equity restraining the board from

proceeding to elect a new member in his place, notwithstanding that he has a remedy at law by *quo warranto*.

Aslatt v. *Corporation of Southampton* (1) and *North London Railway Company* v. *Great Northern Railway Company* (2) considered.

Rule 14 in Schedule II., Part I., to the *Elementary Education Act*, 1870, under which a member of a school board ceases to be a member "if he absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board," does not entitle the board to proceed to the election of a new member in the place of a member who has absented himself on account of ill-health, without first giving the defaulting member an opportunity of explaining or excusing his absence.

THE Plaintiff was, in December, 1892, elected one of the five members of the school board of *Methley*, near *Leeds*. Owing to ill-health he had not attended any of the meetings of the board since his election, except that at a meeting held by the board on the 29th of May, 1893, at which the other three members were present and transacted business, the Plaintiff and Mr. *Jackson*, another member, sat in that part of the board-room assigned to the general public, but without taking any active part in the proceedings. While they were in the room resolutions were passed sanctioning the payment of various sums of money, the minutes of the previous meeting were read and confirmed, and then a resolution was passed as to the education of the children on the canal-boats. These resolutions were declared "carried by three votes, two members remaining neutral," and were so entered on the minutes, which were dictated by the chairman himself, who had noticed the presence of the Plaintiff and *Jackson*, and had entered their names as "present." After these resolutions had been passed, the meeting having, as stated in the minutes, been in progress fifteen minutes, the Plaintiff and *Jackson* left the room. At the next meeting of the board, which was held on the 26th of June, and at which the same three members alone were present, those minutes were confirmed with the exception of the minute reporting the presence of the Plaintiff and *Jackson*, which minute it was accordingly resolved should be struck out; and at the same meeting a resolution was passed declaring the Plaintiff a member in default; also a resolution was passed for holding a special meeting for electing a member in his place.

(1) 16 Ch. D. 143. (2) 11 Q. B. D 30.

KEKEWICH, J.
1893
RICHARDSON v METHLEY SCHOOL BOARD.

These resolutions purported to be passed under rule 14 of Schedule II., Part I., to the *Elementary Education Act*, 1870, which says that "if a member of the school board absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board, or is punished with imprisonment for any crime, or is adjudged bankrupt, or enters into a composition or arrangement with his creditors, such person shall cease to be a member of the school board, and his office shall thereupon be vacant." The Education Department, who had been applied to by the clerk to the board for directions as to procedure under rule 14, replied that they had no power to interpret the rule, but that if the board considered the Plaintiff disqualified, and filled up the vacancy, the Department would, "for the purposes of their administration," enter the name of the person who filled the vacancy as a member of the board.

On the 30th of June, 1893, the Plaintiff applied for and obtained an *ex parte* interim injunction restraining the Defendants, the school board, from summoning or holding a meeting for the election of a new member in his place. The Plaintiff now moved to continue the injunction until the trial of the action or further order. The Plaintiff, in his affidavits, stated that the proceedings for the election of a new member in his place had really been dictated by ill-feeling towards him on the part of the chairman.

Warmington, Q.C., and *Dibdin*, for the Plaintiff.

Marten, Q.C., and *G. White*, for the Defendants:—

We take the preliminary objection that this Court has no jurisdiction to grant an injunction in a case of this kind. The Plaintiff's proper mode of proceeding is by *quo warranto* in the Queen's Bench Division, and therefore, since he has an existing remedy, the equitable remedy by injunction does not apply, notwithstanding sect. 25, sub-sect. 8, of the *Judicature Act*, 1873. The only case which supports the Plaintiff's contention is *Aslatt* v. *Corporation of Southampton* (1); but that decision has been

(1) 16 Ch. D. 143.

questioned by the Court of Appeal in *North London Railway Company* v. *Great Northern Railway Company* (1). *London and Blackwall Railway Company* v. *Cross* (2), *Farrar* v. *Cooper* (3), *Reg.* v. *Turmine* (4), and *Stannard* v. *Vestry of St. Giles, Camberwell* (5), are also authorities against the Court interfering by injunction in a case of this nature.

KEKEWICH, J.:—

One may at once put aside those cases which deal with futile arbitrations and meetings to pass resolutions which have no legal effect. The only case which really touches the present is *Aslatt* v. *Corporation of Southampton* (6), where the late Master of the Rolls granted an injunction under circumstances very much the same as exist here. That was an action to prevent the position of the plaintiff, an alderman of the borough, being interfered with by the Corporation of *Southampton*, the Court holding that it ought not to be interfered with. The Master of the Rolls stated the position thus (7): "The result, therefore, is, that this gentleman has not become disqualified and does not cease to hold office as an alderman. That being so, the corporation had no right to call a meeting to declare the office void, nor have they any right to impede him in his exercise of the office of alderman. It is said that the meeting itself will do him no harm; but that is not, in my opinion, a sufficient answer. It is no doubt an injury to him to declare the office void, if it is not void; and it is more than an injury to elect some one else to fill the office, and thereby impede him in the exercise of that office." That is, in my opinion, directly applicable to the case of membership of a school board.

Then the Master of the Rolls goes on to discuss the question, such as arises here, of jurisdiction, and he refers to the 25th section, sub-sect. 8, of the *Judicature Act*, 1873, and says that the words "just or convenient" "meant that the Court should

(1) 11 Q. B. D. 30, 36.
(2) 31 Ch. D. 354, 368.
(3) 44 Ch. D. 323.
(4) 1 Q. B. D. 79.
(5) 20 Ch. D. 190.
(6) 16 Ch. D. 143.
(7) 16 Ch. D. 147.

KEKEWICH, J.
1898
RICHARDSON v MATHLEY SCHOOL BOARD

grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere. Now it has been said—and I think truly said—that, as a general rule, the Court only interferes where there is some question as to property. I do not think that the interference of the Court is absolutely confined to that now; there may be cases in which the Court would interfere even when personal *status* is the only thing in question."

Now, if that case had stood uncommented upon, the jurisdiction would, according to that, be unquestionable; but that authority was undoubtedly questioned by the Court of Appeal in *North London Railway Company* v. *Great Northern Railway Company* (1), which, I may observe, is not a case at all on the same lines as the present, because the injunction there sought was to restrain proceeding with a futile arbitration; but the Court of Appeal held that the *Judicature Act* did not alter rights, but only modes of procedure; and this has been decided in several cases, including *Britain* v *Rossiter* (2). In *North London Railway Company* v. *Great Northern Railway Company* (3), Lord *Esher*, after expressing his opinion that the *Judicature Act* had not dealt with jurisdiction at all, but only with procedure, and that it had not given to any Court a jurisdiction which no Court had before, says this: "Individually I should be inclined to hold that if no Court had the power of issuing an injunction before the *Judicature Act*, no part of the High Court has power to issue such an injunction now; but it is not necessary now to decide that. No case, however, has I think gone beyond what my own views on the subject are, unless it be the case of *Aslatt* v. *Corporation of Southampton* (4), where apparently an injunction was granted in a case in which no Court before the *Judicature Act* would have granted an injunction; but it is not a case in which before the *Judicature Act* no Court would have given any remedy, because obviously before that Act there was a remedy by

(1) 11 Q. B. D. 30.
(2) Ibid. 123, 129.
(3) 11 Q. B. D. 36.
(4) 16 Ch. D. 143.

a *quo warranto*." If those observations stood alone I should understand Lord *Esher* to say that the decision in *Aslatt* v. *Corporation of Southampton* (1) is to be supported, because, although the Court could not grant an injunction which could not have been granted before the *Judicature Act*, yet there the injunction was, in point of fact, granted in aid of a legal remedy which existed before the Act, and therefore the Act applied. But a little lower down in his judgment Lord *Esher* says, "the only case which goes beyond my own personal inclination as to the construction of this section"—sect. 25, sub-sect. 8—"is the case of *Aslatt* v. *Corporation of Southampton*; and I doubt whether that case is rightly decided: but it is not necessary now to determine this." Of course, if Lord *Esher* had said that *Aslatt* v. *Corporation of Southampton* had been wrongly decided, my simple duty would have been to follow him and to deny the jurisdiction; but I cannot read his words as saying that it was wrongly decided; and, moreover, Lord Justice *Cotton*, in giving judgment, refers (2) to the observations of the late Master of the Rolls in that case (3), and says the Master of the Rolls "assumes there that the plaintiff had a legal right and a remedy at law independently of the Act, and upon that ground he merely follows out what I think is the principle, that where there is independently of the Act a right which can be asserted either at law or in Equity, then this section provides that where it is right in order to do effectual justice an injunction may be granted." Therefore Lord Justice *Cotton* upholds the decision in *Aslatt* v. *Corporation of Southampton* on the very grounds laid down by Lord *Esher*.

The argument here is that there is a legal remedy open to the Plaintiff by *quo warranto*, and that, therefore, the equitable remedy does not apply. So to hold would, in my opinion, be departing from what was said by Lord Justice *Cotton*.

Then it is said that I ought not to apply that to this case. That depends upon the facts which are not yet sufficiently before me. I should add that *Reg.* v. *Turmine* (4) is not a case in point: it was considered on the merits, not on the question of jurisdiction.

(1) 16 Ch. D. 143.
(2) 11 Q. B. D. 40, 41.
(3) 16 Ch. D. 147, 148.
(4) 4 Q. B. D. 79.

KEKEWICH, J
1893
RICHARDSON v METHLEY SCHOOL BOARD

Warmington, Q.C., and *Dibdin*, for the Plaintiff, then argued on the facts of the case, contending that the Plaintiff had not "absented himself" within the meaning of the rule under the *Elementary Education Act*, 1870.

Marten, Q.C., and *G. White*, for the Defendants:—

We submit that the Plaintiff "absented himself" from the meetings of the board within the meaning of the rule. On the 29th of May he "absented himself" by not taking part in the business of the board. Then, to bring a member within the rule there must be either temporary illness or some other cause of absence, to be approved by the board in either case. What is meant is, that the member must communicate the reason of his absence to the board, who are to be the judges as to the validity of the reason. In the present case the Plaintiff gave no explanation of his absence to the board until these proceedings were taken.

KEKEWICH, J:—

Into the question of ill-feeling that has arisen it is unnecessary for me to enter. The real question before me is a legal question only. In the first place, has Mr. *Richardson* ceased to be a member of the school board by non-attendance, that is to say, by absenting himself during six successive months? It does not appear to me that he is a member in default. I follow Mr. *Marten* in part of his argument—that a member of the board cannot save his position by looking in casually and taking no part in the proceedings, and being present only a few minutes out of a long meeting. What is sufficient attendance must be decided according to the circumstances of each particular case. But I observe that, according to the minutes of the meeting of the 29th of May, Mr. *Richardson* was present a quarter of an hour while several resolutions were put and sums of money ordered to be paid, and while one matter of importance was under consideration, namely, how the children on the canal-boats were to be educated—a matter obviously of great importance. He was there during that time, and after that it is difficult to say that he was absent from the meeting. But I have the evidence

that the minutes were dictated by the chairman, and these minutes state that Mr. *Richardson* and one or two others "remained neutral." I do not understand how a man can remain neutral without taking some part in the proceedings. Generally he either assents or dissents, but remaining neutral is still taking a part: it is being present and doing something. I cannot understand how a man can remain neutral in his absence.

But there is another point which is conclusive. According to rule 14 of Schedule II., Part I., of the *Elementary Education Act*, 1870, a member of a school board ceases to be a member if he "absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board." Of course that does not mean, and Mr. *Marten's* argument did not go so far as to say, that the illness must be approved by the board; but what I think the rule means is, that the board are to be the judges in the first instance whether there has been such an "illness" as justifies the absence. That appears to me to be reasonable. Mr. *Richardson* does not communicate with the board, does not come to make his excuses, and in no way puts his illness forward. There may have been a want of courtesy to the board in acting in that way. He might have written stating his inability to attend, and there may have been irritation on the part of the board on finding that the work of five members was cast upon four; but if they had chosen to insist on a medical certificate the matter might have been thrashed out in that way. Without, however, giving him a chance of defending himself they proceed to declare him a member in default. I repeat, I say nothing about the ill-feeling; it is enough to say that, in my opinion, the action of the board was illegal.

Then with regard to the question of convenience. If the matter could be tried quickly on *quo warranto*, that might be the best way of dealing with it; but the convenient course appears to be for this Court to exercise its jurisdiction, and, by granting an injunction, to prevent the election of another member. Besides that, even if proceedings by *quo warranto* could now be taken, it would be inconvenient to keep up this irritation until the matter could be decided by the Queen's Bench Division, which could

KEKEWICH, J.
1893
RICHARDSON v. METHLEY SCHOOL BOARD.

not be done for months to come—a delay which would be cruel to the parties.

Accordingly, I continue the injunction.

Solicitors: *Vincent & Vincent*, agents for *North & Sons, Leeds*; *H. Ikin*, agent for *A. Willey, Leeds*.

G. I. F. C.

KEKEWICH, J.
1893
Aug. 2.

In re INMAN.
INMAN *v.* ROLLS.

[1893 I. 861.]

Will—Legacy—Segregation—Severance—Distribution—Residuary Legatees—Interest.

A testator gave his residuary estate to trustees in trust for sale and investment and to pay the income of the trust funds to his wife (who survived him) during her life; and from and after her decease to raise and pay to each of his sons *J.* and *F.* who should be living at his death and should attain twenty-one, the sum of £5000, and also a legacy to each of his two daughters; and subject to such payments, he directed his trustees, after the death of his wife, to stand possessed of the trust funds in four equal shares upon trusts for his four children.

F. attained twenty-one after the death of the widow:—

Held, that the interest on *F.'s* legacy during the period between the death of the widow and his attaining twenty-one belonged to the residuary legatees.

By his will, dated the 24th of January, 1883, *John Inman*, after a bequest of all his furniture, &c., devised and bequeathed all the rest and residue of his property, both real and personal, to trustees upon trust for sale and conversion, and out of the proceeds to pay certain legacies, and to invest the residue of such proceeds and pay the income of the investments to his wife during her life or widowhood; and from and after her decease or second marriage, or previously thereto with her consent in writing, to raise and pay to each of his sons, *John Inman* and *Francis Inman*, who should be living at his decease and should live to attain the age of twenty-one years, the sum of £5000, and also to each of his two daughters, who should be living at his decease and who should live to attain twenty-one

or marry, the sum of £2500; and subject to the aforesaid payments, the testator directed the trustees, after the death or second marriage of his said wife, to stand possessed of the trust moneys and investments in four equal shares upon certain trusts in favour of his said four children respectively.

The testator died in 1884, leaving his widow and his two sons and two daughters surviving him. *John Inman*, the son, attained twenty-one, and the two daughters married, in the lifetime of the widow, and with her consent their legacies were paid to them. The widow died on the 19th of October, 1891, without having married again. On the 22nd of May, 1893, *Francis Inman* attained twenty-one.

This was an originating summons, taken out by *Francis Inman* against the trustees of the will and the other residuary legatees, to have it determined whether he was entitled to interest at 4 per cent. on his legacy of £5000 from the 19th of October, 1891, the date of the widow's death, until the 22nd of May, 1893, when he attained twenty-one.

Warmington, Q.C., and *Ingpen*, for the Plaintiff:—

The Plaintiff is entitled to interest from the death of the widow: *Dundas* v. *Wolfe Murray* (1); *Kidman* v. *Kidman* (2); *In re Medlock* (3). The segregation of the £5000 here is for the benefit of the legatee, not of the residuary legatees.

MacSwinney, for the three Defendant residuary legatees:—

The Plaintiff is not entitled to the intermediate interest he claims: *In re George* (4); *Descrambes* v. *Tomkins* (5); *Heath* v. *Perry* (6); *In re Dickson* (7). The gift is contingent. The question is, Is there a segregation of the pecuniary legacies for the benefit of the legatees? I submit not: *In re Judkin's Trusts* (8); *Festing* v. *Allen* (9).

Banning, for the Defendants, the trustees.

(1) 1 H. & M. 425.
(2) 40 L. J. (Ch.) 359.
(3) 55 L. J. (Ch.) 738.
(4) 5 Ch. D. 837.
(5) 1 Cox, 133.
(6) 3 Atk. 101.
(7) 29 Ch. D. 331.
(8) 25 Ch. D. 743.
(9) 5 Hare, 573.

KEKEWICH, J.

1893

In re INMAN INMAN v. ROLLS

Warmington, in reply.

KEKEWICH, J.:—

This is not merely a question of construction. One has, no doubt, to construe the language of the testator; but, having arrived at the meaning of the testator, I have to apply to it one of those technical rules invented by the Court for the purpose of giving effect to what, no doubt, is in average instances the intention of the testator. The construction of the will is not difficult: the widow is to take a life interest, and after her decease or second marriage the trustees are to raise and pay to each of the testator's sons, *John Inman* and *Francis Inman*, who shall be living at his death and shall attain the age of twenty-one years, the sum of £5000, and to each of his daughters another legacy, £2500, and, subject to the aforesaid payments, he directs his trustees, after the death or second marriage of his wife, to stand possessed of the trust moneys and investments—meaning his residuary estate—upon certain trusts in favour of his children. The first point to be decided is whether the legacy to *Francis* is contingent or otherwise. That it is contingent is clear on the authorities. But it is said that the £5000 must, according to the construction of the will, be set apart immediately after the death of the widow before there can be any distribution of the residue; that those who take the residue can only take what remains after the setting aside of the £5000; and that, therefore, the interest on the £5000, so far as it earns interest, must belong to the legatee. I agree with the latter part of the reasoning involved in the word "therefore"; but I do not otherwise follow the argument: I do not think that the ultimate residuary legatees are to take only what is left after setting apart the legacy of £5000. I do not think that follows from the language, and I think it is contradicted by this consideration: if one son dies before he attains the age of twenty-one, and does not become entitled to the £5000, then that £5000, which would have been set apart to meet the contingent payment, would never have been severed, except by way of account, from the residue, and the residuary legatees would take it; and, taking the £5000 in case of the contingency not occurring, I do not see why they should

not take the interest pending the infancy. So far, therefore, as the construction goes, I am against the Plaintiff.

But it is said that there is to be a severance, and the trustees cannot divide the residue without a severance, and that on making the severance the interest must follow capital, and the child entitled to the capital is also entitled to the interest. I admit there is a severance in order to give the residuary legatees what they are immediately entitled to—that is, the trustees are bound, as a matter of account, to put aside the sum of £5000. To that extent there is a severance, but not for the benefit of the legatees, but for the benefit of the residuary legatees to facilitate the distribution of the estate. That being so, according to the authorities the legacy does not carry interest, but the interest goes into the residue. That seems the clear opinion of Vice-Chancellor *Wood* in *Dundas* v. *Wolfe Murray* (1), where he quotes from the judgment of Vice-Chancellor *Wigram* in *Festing* v. *Allen* (2). The Lord Justice *Kay* deals with the same point in *In re Judkin's Trusts* (3) and quotes the same passage from the judgment of Vice-Chancellor *Wigram*, together with further words; and the same Judge, in the later case of *In re Medlock* (4), explains what he meant in *In re Judkin's Trusts*; and I venture to think there is a little difficulty in the one judgment by the reference it contains to the other. In *In re Medlock* (5) the Lord Justice *Kay* said: "The question is whether in this case I find such a segregation. I thoroughly agree—and I tried to express that proposition in the cases of *In re Judkin's Trusts* and *In re Dickson* (6)—that where there is no direction to set apart, and the setting apart only occurs because it is convenient in the distribution of the residuary estate, the fund remains residue until the contingency happens." But the passage in the judgment of Vice-Chancellor *Wigram*, read in *Dundas* v. *Wolfe Murray* and in *In re Judkin's Trusts*, includes the case where there is a direction to set apart for the convenience of the estate only as well as that in which there is no such direction at all. So that, in the earlier case of *In re Judkin's Trusts*, Lord Justice

(1) 1 H. & M. 425.
(2) 5 Hare, 573.
(3) 25 Ch. D. 743.
(4) 55 L. J. (Ch.) 738.
(5) Ibid. 739.
(6) 29 Ch. D. 331.

KEKEWICH, J.

1893

In re INMAN INMAN *v* ROLLS

Kay considered, not only the cases where there was no direction to set apart, but also the cases where there was a direction to set apart.

Notwithstanding the slight difficulty which the remarks I have read from *In re Medlock* (1) may occasion, I must hold that the Judge meant the same thing in both cases, and follow the opinion of Vice-Chancellor *Wigram* and Vice-Chancellor *Wood*. I think this case comes within the decision of *Festing* v. *Allen* (2) on this point, namely, that the legacy must be set apart, because, until that is done, you cannot pay the residue, but the sum is set apart for the benefit of the residuary legatees, and not of the legatees. I think that the interest follows the legacy, notwithstanding there is a direction in the will to set the legacy apart. I therefore hold that the interest is payable only from the date of the vesting of the legacy, and not from the death of the widow.

According to my general rule that, where a point of this kind is properly raised for the convenience of all parties, nobody should have to pay the costs out of his own pocket of obtaining a decision which concerns them all, I direct payment of the costs of all parties out of the residue.

Solicitors: *P. J. Gordon & Son; F Stewart.*

(1) 55 L. J. (Ch.) 738. (2) 5 Hare, 573.

G. I. F. C.

In re STAFFORDSHIRE GAS AND COKE COMPANY.

KEKEWICH, J.

1893 *July* 28; *Aug.* 1, 11.

Company—Liquidation—Costs of successful Litigant—General Costs of Liquidation—Realization—Costs—Priority.

An application by certain persons to be struck off the list of contributories of a company in liquidation having been successful, the liquidator, who had opposed the application, was ordered to pay their costs out of the assets of the company. The assets in the hands of the liquidator, including calls made and recovered subsequently to the date of the order, were insufficient to satisfy both the Applicants' costs and the costs of the liquidation:—

Held, that the Applicants' costs were payable in priority to the costs of the liquidation other than the liquidator's costs of realization.

As a general rule a liquidator who fails in litigation should be ordered to pay costs without regard to the question whether the assets are sufficient to reimburse him.

ADJOURNED SUMMONS.

The *Staffordshire Gas and Coke Company, Limited*, having gone into liquidation, the Chief Clerk settled certain persons upon the list of contributories. Those persons then took out a summons to vary the Chief Clerk's certificate by striking out their names therefrom. The summons having been dismissed by the Chief Clerk with costs, it was, at the Applicants' request, adjourned into Court. After hearing the arguments on behalf of the Applicants and the official liquidator, Mr. Justice *Kekewich*, on the 8th of December, 1891, ordered the names of the Applicants to be struck off the list, and further ordered "that the official liquidator pay to the Applicants out of the assets of the company respectively their costs incurred by them in Chambers in consequence of the notice by the official liquidator to place them on the list of contributories, and of this application, and of the adjournment thereof into Court, such costs to be taxed by the Taxing Master; and the official liquidator is to be allowed his costs of this application and occasioned by the adjournment thereof into Court, and what he shall so pay to the Applicants as aforesaid out of the assets of the said company, such costs to be taxed by the Taxing Master." The official liquidator, by leave, appealed from that decision, but the appeal

KEKEWICH, J.

1893

In re STAFFORDSHIRE GAS AND COKE COMPANY

was dismissed with costs to be paid by the liquidator to the Applicants.

The liquidator's costs of the appeal and of the hearing below were retained by him out of the assets of the company. He admitted that he had remaining in his hands a balance of £220 14*s.* 1*d.*, representing assets, including calls made and recovered subsequently to the order of the 8th of December, 1891; but said that this sum was wholly insufficient to pay both the Applicants' taxed costs, amounting to £142 19*s.*, under the order of the 8th of December, 1891, and his, the liquidator's, taxed costs of the liquidation; and he claimed to have those costs paid in priority to those of the Applicants.

This was a summons taken out by the Applicants asking that the liquidator might be ordered to pay to them out of the £220 14*s.* 1*d.*, assets admitted by him to be in his hands, their taxed costs under the order of the 8th of December, 1891.

Warmington, Q.C., and *Swinfen Eady*, Q.C., for the summons:—

We submit that the Applicants are entitled to be paid their costs out of the assets in priority to the costs of the liquidator. The case is really concluded by authority. It was decided by *Malins*, V.-C., in *In re Home Investment Society* (1), that where, on an unsuccessful summons by a liquidator, he is ordered to pay the costs of the summons out of the assets, those costs are to be paid in priority to the costs of the winding-up. It is true that that case was apparently doubted by Mr. Justice *Chitty* in *In re Dronfield Silkstone Coal Company* (2); but in *In re Dominion of Canada Plumbago Company* (3) *Pearson*, J., followed *In re Home Investment Society*, and declined to follow *In re Dronfield Silkstone Coal Company*, and his decision was affirmed by the Court of Appeal. Though the decision of the Court of Appeal was not based on entirely the same grounds as *Pearson*, J.'s, there is no note of any dissent by any of the Lords Justices from the opinions expressed by *Pearson*, J. The same principle was more recently applied by the Court of Appeal in the case of *In re Blundell* (4), where, in proceedings taken with the

(1) 14 Ch. D. 167.
(2) 23 Ch. D. 511.
(3) 27 Ch. D. 33.
(4) 44 Ch. D. 1.

sanction of the Court, persons unsuccessfully attacked by a company having the conduct of an administration action were held to be subrogated to the company's right of indemnity against the estate, and entitled to be paid their costs out of it in priority to those of the company.

Renshaw, Q.C., and *C. G. Hyde*, for the liquidator:—

We submit that the liquidator should have the whole of his costs in priority to the Applicants, or at all events the costs of realization, especially those subsequent to the date of the order of the 8th of December. In *In re Dominion of Canada Plumbago Company* (1) the order made for payment of the costs of the successful litigant out of the "assets" was confined to assets actually in hand at the date of the order. There is no authority that the liquidator, in such a case as this, has not a prior right to have his subsequent costs of realization paid out of subsequent assets. As to a liquidator's general costs of realization, it has been held that he is entitled in priority to debenture-holders: *In re Marine Mansions Company* (2); *In re Oriental Hotels Company* (3); *Ex parte Grissell* (4). It is against the practice to give successful litigants, in a winding-up to which they are parties, their costs in priority to the costs of realization.

Warmington, in reply:—

The cases just cited are instances in which a person comes in voluntarily, for his own benefit, to take advantage of the liquidation. That is not this case. Here we have been dragged into litigation, and are therefore not within the principle of those cases.

1893. Aug. 11. KEKEWICH, J.:—

In *In re Dominion of Canada Plumbago Company* Lord Justice *Baggallay* said that the order for payment of costs by the official liquidator might be drawn in different forms, and he mentioned two—viz., an order for payment out of the assets of

(1) 27 Ch. D. 33, 39.
(2) Law Rep. 4 Eq. 601.
(3) Law Rep. 12 Eq. 126, 132.
(4) 3 Ch. D. 411, 427.

KEKEWICH, J.

1893

In re STAFFORDSHIRE GAS AND COKE COMPANY

the company and an order for payment by the official liquidator with liberty to him to recoup himself out of the assets. In the present case there is a third form. The order of the 8th of December, 1891, which has occasioned the dispute now falling for decision, directs the official liquidator to pay the Applicants out of the assets of the company, and directs that he be allowed those costs, together with his own, out of the same assets. I am not sure whether this last direction was necessary—that is, whether the same result would not have been attained without its insertion; but I think that it cannot in any wise alter the position of the Applicants.

The distinction between an order on the liquidator to pay costs and an order on him to pay costs out of the assets is large and clear. There is no good reason why a liquidator engaging in litigation with any persons, either members of or strangers to the company, should not run the risk of costs, and, as regards them, be treated in the same manner as an ordinary litigant. In other words, it seems to me that, subject, of course, to the discretion of the Court, to be exercised with reference to the particular circumstances of the case in hand, the liquidator, if he fails, ought to be ordered to pay the costs of his successful opponent without regard to the question whether the assets are sufficient to reimburse him or not. Behind that lies the question —in which the opponent is not generally concerned—whether the liquidator ought to be allowed to recoup himself out of the assets of the company; but a direction to this effect can always be obtained from the Judge to whose Court the liquidation is attached if he is satisfied that the liquidator's conduct has been reasonable and proper—a result which is generally provided for by a prospective application on the part of the liquidator to be at liberty to engage in the particular litigation.

It has, I believe, generally, although perhaps not invariably, been the rule of the Court, not having the control of the litigation, to direct the unsuccessful liquidator to pay the costs simply, and to ignore his title or claim to be recouped out of the assets. What is true of liquidators is likewise true of trustees in bankruptcy, as also of executors and trustees, or others who, though representing the interests of others, yet in

any litigation in which they happen to be engaged fight, as between themselves and their opponents, for their own hand. If, therefore, as in the present case, I find a direction, not that the liquidator do pay costs, but that he do pay them out of the assets of the company, I am bound to read that as signifying something different from an order for personal payment of costs. Why the order now under consideration was drawn up in this form I do not know, unless it be that it has, by a practice which I venture to deprecate, become a common form; but I must deal with the order as it stands.

It may be as well to refer again to the contrast of the two forms made by Lord Justice *Baggallay*, and to observe that the judgment of Mr. Justice *Pearson* in the same case is a little embarrassing, because he apparently treated the two as equivalent. What, then, is the meaning of an order to pay costs out of the assets of the company? I can hardly think it means that the liquidator is to make such payment out of the gross assets—that is, the moneys coming to his hands without any deduction for any purpose—or that the litigant who has obtained such an order is entitled to treat the costs as a charge on the assets ranking from the date of his order, and taking priority over all charges thereon subsequent in date. That they are to be paid in priority to the general costs of winding-up is settled by the decision of Vice-Chancellor *Malins* in *In re Home Investment Society* (1), which, though criticised by Mr. Justice *Chitty* in *In re Dronfield Silkstone Coal Company* (2), was followed by Mr. Justice *Pearson* in *In re Dominion of Canada Plumbago Company* (3), and not affected by the decision of the Court of Appeal in the same case. On the other hand, it would be unfair and inconsistent with the practice in administration proceedings not to give the liquidator credit for realization costs—that is, costs incurred in bringing home those assets against which the claim is made.

It seems to me impossible that a claimant, however strange to the litigation and however adverse, can justly insist on payment out of assets which he is bound to admit have been properly

(1) 14 Ch. D. 167. (2) 23 Ch. D. 511.
(3) 27 Ch. D. 33.

KEKEWICH, J.

1893

In re STAFFORDSHIRE GAS AND COKE COMPANY

realized, and yet to have the costs of realization disallowed. Similar remarks are applicable, and with no less force, to expenditure, if any there has been, in the preservation of property coming under the head of "salvage." These points might perhaps be taken to be open as regards persons whose costs the liquidators have been ordered to pay, but are concluded as regards debenture-holders, who for this purpose are equally strangers to the liquidation (see *In re Marine Mansions Company* (1) and *Ex parte Grissell* (2)). It may be difficult sometimes to determine precisely what costs fall within those incurred in realization, and salvage often proves a troublesome matter; but there is no occasion for me now to discuss this in detail or to consider how to adjust the rights against the assets of several parties in possession of orders of this character.

The costs of the Applicants now remaining to be paid under the order of the 8th of December, 1891, are admitted to amount to £142 19*s.*, and to this must be added the costs of this application, which, having regard to the history of the case, it would not be fair to throw on the liquidator personally. He has in hand, I understand, £220 14*s.* 1*d.*, but says that the costs of realization will absorb so much of this amount that but little will be left for the Applicants. I am, however, told that, in calculating the money in hand, he has credited himself with his costs of resisting the Applicants here and in the Court of Appeal, and also, strange to say, the costs which by the order of the Court of Appeal were directed to be paid by him, and not out of the assets. If these three items are all disallowed, as I certainly think they ought to be, the amount in hand would be so increased as to enable the liquidator to pay the Applicants in full after discharging all the costs of realization. It is for the liquidator to consider whether he will have an account taken or not; but it must be taken at his risk, by which I mean that he must look forward to being ordered to pay the costs of it should the result be of no substantial benefit to him.

My order, unless the liquidator desires an account, will be that he do pay the £142 19*s.* and the costs of this application out of the moneys remaining in his hands as representing the

(1) Law Rep. 4 Eq. 601. (2) 3 Ch. D. 411.

assets of the company, after deducting only the costs of realization; but, if he so desires, an account will be directed of the assets remaining after deducting only the costs of realization, and there will be liberty to apply in Chambers for payment of the £142 19*s.* and the costs of this application after that account has been taken, and the costs of the account will be reserved. As it may involve consideration of figures, I do not insist on the liquidator at once saying in what form he will take the order. The Applicants are entitled to have it drawn up at once, and he must be prepared to elect before the Registrar.

Solicitors: *Bower, Cotton, & Bower*; *Hurrell & Mayo.*

G. I. F. C.

ROMER, J.

1893

June, 1, 2.

THORNE *v.* HEARD.

[1892 T. 1682.]

Mortgage—Sale—Negligence of Mortgagee—Fraud of Agent—Payment of Interest by Agent—Statute of Limitations (21 *Jac.* 1, *c.* 16)—*The Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

In 1878 *A.*, the first mortgagee of property, sold under his power of sale, and employed *S.*, a solicitor, to conduct the sale for him. *S.* received the sale moneys, and, after satisfying *A.*'s mortgage debt, retained the surplus of the sale moneys, falsely representing to *A.* that he had the authority of the second mortgagee to receive the same. *S.* applied the surplus to his own use, and from 1878 to 1891 paid the second mortgagee interest on the second mortgage as though it were still existing. In 1891 *S.* became bankrupt, when the true facts transpired. In an action by the second mortgagee against *A.*, claiming an account of the sale moneys, and payment of what was due to him on his second mortgage :—

Held, (1.) that under the circumstances the payment of interest by *S.* did not keep alive the claim of the second mortgagee against *A.*, because *S.* did not make the payments as *A.*'s agent; (2.) that although *A.* had been guilty of negligence in not seeing that *S.* paid over the surplus sale moneys to the second mortgagee, yet he was not party or privy to the fraud of *S.*; and (3.) consequently that the claim was barred by the *Statute of Limitations* and the *Trustee Act*, 1888, s. 8.

By an indenture of lease dated the 24th of June, 1867, a parcel of land and premises, afterwards known as "*The Nest*," were demised to *W. Stabb* for a term of ninety-nine years.

By an indenture dated the 5th of August, 1868, *W. Stabb* assigned the said premises to *S. Maunder* for the unexpired residue of the said term of ninety-nine years, except the last ten days thereof, by way of mortgage to secure the payment of £1000 with interest. The mortgage deed contained the usual power of sale, and the usual declaration that the mortgagee, his executors, administrators, and assigns should hold the moneys to arise from any sale in pursuance of the aforesaid power upon trust, in the first place, thereout to pay all the expenses incurred on such sale or otherwise in relation to the premises, and in the next place to apply such moneys in or towards satisfaction of the moneys for the time being owing on the security of the mortgage, and then to pay the surplus (if any) of

the moneys arising from such sale to the mortgagor, his executors, administrators, or assigns. This mortgage ultimately became duly vested by transfer in the Defendants, *Henry Ellis Heard* and *William Marsh*.

By deeds dated the 25th of June, 1869, and the 22nd of November, 1870, *W. Stabb* created further mortgages on the said leasehold premises, and in March, 1872, these two mortgages became duly vested by transfer in the Plaintiff, *Henry Thorne*. Throughout the above transactions, *James Searle*, a solicitor, acted on behalf of the mortgagor. He also acted as solicitor for the Plaintiff and the Defendants on the occasions when they respectively took their said mortgages; and from 1872 until the sale after mentioned he (on behalf of the mortgagor) paid to the Plaintiff the interest that from time to time accrued due on his securities.

In January, 1878, the Defendants, in exercise of the power of sale contained in the mortgage of the 5th of August, 1868, sold and conveyed the said leasehold premises to *Eliza Stewart* for £1700. At this time there was due to the Plaintiff, as the second mortgagee, the sum of £333 on his said securities; and there was also due to the said *James Searle*, as the third mortgagee of the same property, the sum of £375 3*s*. 6*d*.

The Defendants employed *James Searle* as their solicitor to conduct the said sale in the usual way, and he received the £1700, and after paying over to the Defendants the £1000 due to them there remained in his hands a balance of £700. He accounted to them for this balance by handing them two receipts, both dated the 5th of February, 1878.

One receipt was as follows:—

"Received of Messrs. *Henry Ellis Heard* and *William Marsh* the sum of £333, being principal money due to Mr. *Henry Thorne* on two further charges by way of mortgage on '*The Nest*,' *Torquay, Devon*, dated respectively the 25th of June, 1869 and the 22nd of November, 1870, and I undertake to deliver to them the indentures dated the 15th and 18th of March, 1872, being transfers of such mortgages, and Mr. *Thorne's* receipt indorsed thereon, within fourteen days from this date.

"*James Searle*."

ROMER, J
1893
THORNE
v.
HEARD

The Defendants accepted this receipt in the *bonâ-fide* belief that *Searle* was duly authorized to give the same on the Plaintiff's behalf.

The other receipt ran:—

"Received of Messrs. *Henry Ellis Heard* and *William Marsh* the sum of £375 3*s.* 6*d.*, being the balance of the purchase-money of '*The Nest*,' *Torquay, Devon*, sold to Mrs. *Eliza Stewart*, for £1700 (after their retaining the sum of £1000 due on their first mortgage, and paying to Mr. *Henry Thorne* the sum of £333 due to him on mortgage of the same premises, subject to the first security to them), the sale thereof having been carried out by Messrs. *Henry Ellis Heard* and *William Marsh*, with the approval of Mr. *Henry Thorne*, and at my request.

"*James Searle.*"

In February, 1892, *James Searle* was adjudicated bankrupt, and it was then discovered for the first time that he had no authority from the Plaintiff to give the receipt of the 5th of February, 1878, and had not only not communicated the fact of the sale to the Plaintiff, but had misappropriated the £333 to his own use. He had also from January, 1878, to March, 1891, continued to pay interest to the Plaintiff on his said securities as though they were still existing. Thereupon the Plaintiff brought this action against the Defendants, claiming an account of the proceeds of the said sale, and payment by the Defendants to him of what was due to him on his securities. The Defendants denied their liability and relied on the *Statute of Limitations* (21 Jac. 1, c. 16) and the *Trustee Act*, 1888, s. 8.

Neville, Q.C., and *Borthwick*, for the Plaintiff:—

Searle received the £1700 as agent for the Defendants, who were trustees of the balance for the subsequent incumbrancers. The Defendants were guilty of negligence in omitting to see that *Searle* paid over the £333 to the Plaintiff in accordance with the terms of the receipt, and under the circumstances they must be taken to be party or privy to *Searle's* fraud, and the payment of interest by him kept alive the Plaintiff's claim, and the statute did not commence to run until the discovery of the

fraud in 1892: *Rew* v. *Pettet* (1); *Gibbs* v. *Guild* (2). Under the circumstances the surplus sale moneys were "retained" by the Defendants within the meaning of sect. 8 of the *Trustee Act*, 1888.

Chadwyck Healey, Q.C., and *Creed*, for the Defendants:—

Even if the Defendants were guilty of negligence, in no sense were they parties or privies to the fraud of *Searle*. He purported to act for the Plaintiff and deceived the Defendants as well as the Plaintiff, and from the date when he gave the receipt he ceased to act for or represent the Defendants in any way. The Defendants are therefore protected by the statute.

Neville, in reply.

ROMER, J.:—

The facts are not substantially in dispute, and the only real question in the case is whether the Plaintiff's claim is not barred by lapse of time and the operation of the *Trustee Act*, 1888, s. 8. I think it is. The Plaintiff's first point is that his claim is kept alive by the payment of interest by *Searle*. But this interest was admittedly not paid with the Defendants' knowledge, and in my opinion was not paid on their behalf or by their agent, or under such circumstances as would keep on foot the claim as against them. What happened was really this. *Searle* acted as solicitor for the Defendants in the sale. He was trusted by them and left to do what was right in the matter. He received the purchase-money, and discharged himself of it as between himself and the Defendants as to the balance, after paying Defendants' first mortgage debt, by paying it to himself on behalf of the subsequent mortgagees. In particular, as to the mortgage due to the Plaintiff, he gave the receipt of the 5th of February, 1878, relating to the £333. That receipt to my mind shews that, as between *Searle* and the Defendants, he held the £333 no longer for them or as their agent; but he held it on behalf of the Plaintiff *Thorne*, and I think it would have been impossible for *Searle* to say, as against the Defendants,

(1) 1 A. & E. 196. (2) 9 Q. B. D. 59.

ROMER, J
1893
THORNE
v
HEARD

after this receipt, that he did not represent himself as having authority to receive the same for *Thorne*. As a matter of fact he had no such authority, and instead of paying over the £333 to the Plaintiff, for whom he held it, he gradually used it for his own purposes, and paid *Thorne* interest on it, as if the mortgage debt was still existing. But I cannot see how under these circumstances it can be successfully contended that such payment of interest was a payment by the Defendants or their agent on their behalf, or kept alive the Plaintiff's claim as against the Defendants. The Defendants were no doubt negligent in not inquiring as to the solicitor's authority, and in not seeing that the Plaintiff got his money, and as against the Plaintiff himself they would remain liable if no *Statute of Limitations* applied; but this negligence could not be held in any sense fraud by them or prevent their claiming the benefit of any *Statute of Limitations*, if such statute would protect them from the Plaintiff's claim if made after the prescribed lapse of time. This leads me to the consideration of the question whether the *Trustee Act*, 1888, s. 8, applies in the Defendants' favour. I think it does. The claim is not founded on any fraud or fraudulent breach of trust to which they were party or privy. *Searle's* fraud was not theirs, nor were they party or privy to it, nor is the property the subject of the action still retained by them, nor has it been converted to their use. The circumstances under which the balance of the proceeds of sale was dealt with I have already indicated, and I cannot see how under those circumstances it can be fairly said that they retained that balance by *Searle* as their agent, or that they received it and converted it to their own use within the meaning of that phrase as used in sect. 8. Under these circumstances, sub-sect. (*a*) applies, and the Plaintiff's claim is barred. The action must be dismissed with costs.

Solicitors for Plaintiff: *Mear & Fowler*, agents for *G. H. Thorne, Nottingham.*

Solicitors for Defendants: *Yarde & Loader*, agents for *Prickman & Risdon, Exeter.*

H. L. F.

MAYOR, ALDERMEN, AND CITIZENS OF OXFORD v. CROW.

ROMER, J.

1893

July, 4, 5.

[1892 O. 1591.]

Corporation—Common Seal—Executory Contract—Ratification—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 22, *sub-s.* 2.]

A lessee of buildings belonging to a municipal corporation wrote letters on the 10th and 13th of May, 1892, to the mayor and the chairman of the public improvements committee of the corporation—which had not been appointed under seal—offering to surrender his lease, pull down the existing buildings, and erect new buildings, provided the corporation would grant him a new lease on specified terms.

On the 13th of May, 1892, the town clerk wrote to the lessee that the committee accepted his proposals, subject to the council's approval.

On the 27th of May, 1892, the lessee wrote to the town clerk modifying the terms of his original proposals.

On the 1st of June, 1892, the council approved, but not under seal, the committee's acceptance of the original proposals, and this approval was communicated to the lessee by letter.

On the 21st of July, 1892, the Defendant, by letter, withdrew his proposals:—

Held, that the contract, not having been under the seal of the corporation, or signed on their behalf by any person authorized under seal to do so, or ratified under seal, or part performed or acted on, could not be enforced by the corporation.

Mayor of Kidderminster v. *Hardwick* (1) followed.

C. F. CROW, at the time when the correspondence set out below took place, held a building at the junction of *Magdalen Street* and *George Street*, *Oxford*, under a lease from the mayor, aldermen, and citizens of *Oxford*.

In answer to certain letters from the Town Clerk of *Oxford*, the Plaintiff wrote to the Mayor of *Oxford* a letter dated the 10th of May, 1892, offering to surrender his existing lease, to pull down the old building comprised in it, and to erect a new building on part of the site, at a cost of £4000, within twelve months, provided the city would grant him a new lease for seventy-five years at a ground-rent of £100 per annum.

In a letter dated the 13th of May, 1892, addressed to *Hugh*

(1) Law Rep. 9 Ex. 13.

ROMER, J
1893
MAYOR, ALDERMEN, AND CITIZENS OF OXFORD v CROW.

Hall, who was the Chairman of the Public Improvements Committee of the *Oxford* City Council (which had not been appointed under the seal of the corporation), *C. F. Crow* referred to his offer to the corporation, and said that proposal included all claims he might have for compensation for the loss of business and other things incidental to the taking down and rebuilding.

On the same day the town clerk replied as follows: "The committee have considered your letters of the 10th inst. and of this morning, and they instruct me to inform you that they accept the proposals therein contained, subject to the approval of council."

On the 27th of May, 1892, *C. F. Crow* wrote to the town clerk, saying that in his letter of the 13th of May he had overlooked one year's income—£1000—and asking that this amount might be included in his offer, and that he might have the privilege of occupying a building belonging to the corporation during the rebuilding of his premises.

The approval of the council to the acceptance of the offer contained in *C. F. Crow's* letters of the 10th and 13th of May, 1892, was given on the 1st of June, 1892, but was not under seal; and on that day the town clerk wrote to *Crow*, saying that the council had ratified the agreement made by the committee with *Crow*, mentioned in the writer's letter of the 13th of May, 1892, and saying also that the council were willing to let *Crow* have the use of the premises mentioned in his letter of the 27th of May, 1892, for one year from the 24th of June, 1892.

On the 21st of July, 1892, *Crow* wrote to the town clerk as follows: "The offer I made to the corporation with reference to the proposed widening of the corner of *George Street* was contained in my letters of the 10th, 13th, and 27th of May last. The claim for £1000, which formed part of my proposals, has been altogether ignored; and, inasmuch as my offer has not been accepted in its entirety, I hereby withdraw the same."

The corporation brought an action against *Crow* for a declaration that an agreement in writing made by the letters of the Defendant of the 10th of May, 1892, and the 13th of May, 1892, and by the letter in reply of the 13th of May, 1892, was binding upon the Defendant, and for specific performance of such agreement.

The Defendant, by his defence, denied that any agreement in writing was made between the Defendant and the Plaintiffs by the above-mentioned documents. He also pleaded that, before acceptance of his proposals of the 10th and 13th of May, 1892, the letter of the 27th of May, 1892, had introduced further terms into his proposals, and that the proposals in his three letters had never been accepted and had been withdrawn; that the committee could not accept his original proposals except subject to the approval of the *Oxford* City Council; that the committee's acceptance was only conditional on such approval, and that before such approval was obtained the proposals were modified.

Neville, Q.C., and *Ashton Cross*, for the Plaintiffs:—

The Defendant's offer, contained in his letters of the 10th and 13th of May, 1892, was unconditionally accepted by the town clerk's letter of the 13th of May, 1892. Assuming the approval of the corporation was required, the case was like a sale made subject to the sanction of the Court; in which case, on the sanction being obtained, the contract is good as from the date when it is entered into. There was no withdrawal of the offer before the council ratified the contract; but, if there had been, the ratification would have related back to the committee's acceptance, and rendered the withdrawal inoperative: *Bolton Partners* v. *Lambert* (1); *In re Portuguese Consolidated Copper Mines* (2). The letter of the 27th of May, 1892, was not an introduction of new terms into the offer, but an attempt to obtain a concession after the contract had been entered into.

Haldane, Q.C., and *J. T. Prior*, for the Defendant:—

Bolton Partners v. *Lambert* has been observed upon in *Fry* on Specific Performance (3); but, assuming that it was rightly decided, it has no application to the present case. In that case the contract was one which the plaintiff company could enter into by its agent, and there was only ratification of what could have been validly done if the person assuming to act as agent had been authorized so to act. But here, the corporation, when

(1) 41 Ch. D. 295. (2) 45 Ch. D. 16.
(3) 3rd Ed. Appendix A.

ROMER, J.
1893
MAYOR, ALDERMEN, AND CITIZENS OF OXFORD v. CROW.

the so-called acceptance of the 13th of May, 1892, was given, had no authority to contract except by an instrument under seal. What the committee purported to do was a mere nullity, which could not by ratification be turned into valid acceptance of an offer: *In re Empress Engineering Company* (1); *Kelner* v. *Baxter* (2); *In re Northumberland Avenue Hotel Company* (3). Moreover, in *Bolton Partners* v. *Lambert* (4) there was, in terms, a simple acceptance; whereas the committee's acceptance was subject to the approval of the council, which is an introduction of a new term.

The contract of the corporation ought to have been under its seal: *Mayor of Kidderminster* v. *Hardwick* (5). There was no contract under seal, but a mere nullity, and the Defendant's offer was withdrawn before acceptance.

Sect. 22 of the *Municipal Corporations Act* (6) does not empower a corporation to delegate its powers to a committee. The committee can only make a recommendation to the council; the contract itself must be entered into by or on behalf of the corporation. We do not, however, contend that the corporation could not, in pursuance of a resolution, have appointed an agent under seal.

Neville, in reply:—

The Defendant's counsel have failed to distinguish *Bolton Partners* v. *Lambert*. In *In re Empress Engineering Company* and the other company cases cited by them there was no principal in existence when the contract was entered into by the person purporting to act as agent.

Mayor of Kidderminster v. *Hardwick* was a case relating to tolls which could only have been conveyed by an instrument under seal.

(1) 16 Ch. D. 125.
(2) Law Rep. 2 C. P. 174.
(3) 33 Ch. D. 16.
(4) 41 Ch. D. 295.
(5) Law Rep. 9 Ex. 13.
(6) "The council may from time to time appoint out of their own body such and so many committees, either of a general or special nature, and consisting of such number of persons, as they think fit, for any purposes which, in the opinion of the council, would be better regulated and managed by means of such committees; but the acts of every such committee shall be submitted to the council for their approval" (45 & 46 Vict. c. 50, s. 22, sub-s. 2).

ROMER, J.

1893

MAYOR, ALDERMEN, AND CITIZENS OF OXFORD v. CROW

ROMER, J.:—

Personally, I am sorry I have to decide as I do, for I cannot help seeing that my decision will cause embarrassment and that delay is important. But I feel compelled to come to the conclusion which I am about to state.

In the first place, the contract sought to be enforced by the corporation is clearly one that required to be made under their seal. It is not within any of the exceptions, as to contracts by corporations, which need not be under seal. This contract is not under the seal of the corporation, or signed on their behalf by any person authorized under seal to do so, nor has it been ratified under seal. It has not been part performed or acted upon, and it appears to me under these circumstances that the case is governed by the authority of *Mayor of Kidderminster* v. *Hardwick* (1)—an authority which ought to be followed by me, and has not been affected by any of the provisions of the *Municipal Corporations Act*, 1882.

[His Lordship then dealt with other objections taken by the Defendant, and dismissed the action with costs.]

Solicitors for Plaintiffs: *Budd, Johnsons, & Jecks*, agents for *J. J. Bickerton*, Town Clerk of *Oxford*.

Solicitors for Defendant: *Newton, Wyatt, & Newton*.

(1) Law Rep. 9 Ex. 13.

F. E.

VAUGHAN WILLIAMS, J.

1893
July 13, 21.

In re LONDON CHARTERED BANK OF AUSTRALIA.

[00116 of 1893.]

Company—Winding-up—Scheme of Arrangement—General Effect—Preserving Rights against Sureties—Transfer to New Company—Preserving Liability of Old Shareholders—Staying Proceedings against Old Company—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), s. 2.

A scheme of arrangement sanctioned by the Court under the *Joint Stock Companies Arrangement Act*, 1870, is an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the winding-up, whether voluntary or under the Court, and it is by operation of law that the scheme becomes effective to relieve the company and its contributories from further liability than that which is contemplated or imposed by the scheme; their discharge being effected by the stay of actions imposed by sect. 87 of the *Companies Act*, 1862, after a winding-up or supervision order, and by an order to stay under sect. 138 of the same Act in the case of a voluntary winding up—coupled with the stay of the winding-up proceedings excepting so far as necessary for carrying out the scheme.

It is, therefore, unnecessary to insert in the scheme a reservation of the rights of sureties for the company's debts, or to insert in the order sanctioning it—at all events in a winding-up by order or under supervision of the Court—any express words staying proceedings by creditors, or discharging contributories from further liability than that imposed by the scheme.

Where the scheme contemplates the formation of a new company to take over the assets of the liquidating company, and shareholders in the old company are allowed to take shares, not fully paid up, in the new company in respect of shares as to which they are liable in the winding up, the Court may, as a condition of sanctioning the scheme, require the insertion, in the memorandum of association of the new company, of a clause preventing them from escaping liability by transferring their new shares.

ON the 17th of May, 1893, an order was made by Mr. Justice *Vaughan Williams* for the winding up of the *London Chartered Bank of Australia* (which was incorporated by Royal charter on the 2nd of December, 1852, and was regulated thereby, and by subsequent charters and a deed of settlement), and constituting *C. J. Stewart*, the official receiver, provisional liquidator of the affairs of the bank. The bank was not registered under any of the *Joint Stock Companies Acts*, or the *Companies Act*, 1862, or any Colonial Act; its principal place of business was at No. 2, *Old Broad Street*, in the city of *London*.

On the 9th of June, 1893, *C. J. Stewart* was ordered to convene separate meetings of (1.) the creditors (other than the Government, the holders of bank notes, and creditors entitled, in respect of rates, taxes, wages, and other claims, if any, payable in full or in priority in the winding-up), and (2.) the contributories, for the purpose of considering, and if thought fit approving, with or without modification, a scheme of arrangement proposed between the bank and its creditors under the *Joint Stock Companies Arrangement Act*, 1870.

The proposed scheme was approved by the requisite majorities of creditors and contributories, and on the 5th of July, 1893, a petition was presented by the bank and *C. J. Stewart*, as official receiver and liquidator, asking for the sanction of the Court to the scheme.

The scheme stated that the capital of the bank was £1,000,000 in 50,000 shares of £20 each, fully paid, but with a further liability, on winding up, of £20 per share, and that its liabilities on the 25th of April, 1893, were approximately as follows:—

(*a*) Amounts due on terminable deposits and on current accounts		£5,841,819	
(*b*) Bank drafts or acceptances current or due at date of suspension	£288,632		
(*c*) Amounts due to Government.	448,099		
(*d*) Amounts due on note issue	243,360		
		£980,091	
			£6,821,910

The scheme further stated that (*c*) and (*d*) constituted preferential claims, and that it was considered imperative, in order to maintain the business connection of the bank, to provide for the payment in cash of (*b*).

The scheme then provided, *inter alia*, (1.) that a new company should be formed and registered under the *Companies Acts*, 1862 to 1890, entitled "*The London Bank of Australia, Limited*"

VAUGHAN WILLIAMS, J.

1893

In re LONDON CHARTERED BANK OF AUSTRALIA.

(thereinafter called "the *New Bank*"), with a capital of £4,000,000, in 62,500 ordinary shares of £40 each, and 150,000 5½ per cent. preference shares of £10 each; (2.) that the remaining liability of £20 per share on the shares in the *Old Bank* should be immediately called up, the winding-up to continue for the purpose of getting in this call and applying it in paying the £980,091 and the costs of the winding-up—any deficiency to be paid by the *New Bank* in cash to the liquidator; (3.) that every shareholder in the *Old Bank* should on application be allotted ordinary shares in the *New Bank* equal in number to his old shares, with £15 per share credited as paid up, being indemnified by the *New Bank* against payment of calls on the old shares in respect of which he should so apply; (4.) that the *New Bank* should assume and provide for all liabilities of the *Old Bank*, except the £980,091, and should take over all its assets, business, and goodwill, other than the proceeds of the £20 call and of any shares realized by the liquidator as thereinafter provided; (5.) that the £25 per share liability on the £40 ordinary shares should be payable, as to £10, by four instalments during 1893 and 1894, and that in the event of transfer of any share before the £10 was paid, the transferor should be a surety to the *New Bank* for payment thereof by the transferee, the remaining liability of £15, as to £2 10*s.*, to be called up after the 1st of May, 1895, when the directors should think expedient, and as to the ultimate balance of £12 10*s.* to remain as a reserve liability; (6.) that the *New Bank* should pay in cash all rates, &c., and other claims (if any) payable in priority, and certain interest, and, besides paying the above deficiency, should pay such fees, costs, and expenses as the call of £20 and other assets retained by the liquidator should be insufficient to satisfy. The scheme also provided for the issue to creditors of the *Old Bank* applying within a reasonable time (other than those in respect of the £980,091) of fully-paid 5½ per cent. preference shares in the *New Bank* in satisfaction of their debts, and for the issue to creditors, in discharge of the *Old Bank's* liabilities (other than the £980,091, and the liabilities discharged by the issue of preference shares), of deposit receipts bearing interest and payable by instalments, the last of which was to fall due in July, 1907.

The scheme also made provision for the insertion in the memorandum of association of the *New Bank* of certain special powers, and contained a clause (17.) that "all details in connection with the carrying out of the said scheme shall be settled by the liquidator, who may assent to any modification in the details of the scheme which the Court may think fit to approve or impose."

Before the winding-up order was made some customers of the *Old Bank* had deposited money with it on the security of deposit notes, and had effected mortgage assurances on such deposits with an insurance company.

The scheme did not contain any provision that sureties of the *Old Bank* should not be released from their obligations, or (except as above stated) that the shareholders therein should not be able to get rid of their liabilities by transferring their shares in the *New Bank*.

The petition was heard before Mr. Justice *Vaughan Williams* on the 13th of July, 1893.

Latham, Q.C., and *Howard Wright*, in support of the petition.

Moloney; *Byrne*, Q.C., and *John Henderson*; *Buckley*, Q.C., and *Walter B. Lindley*; *A. J. Allen*, and *J. E. C. Munro*, for creditors supporting the petition:—

The scheme is framed in the interest of the creditors, but it should provide that the shareholders in the *Old Bank* should not be able to get rid of their liabilities by transferring their shares in the *New Bank*. If they transferred their shares and the *New Bank* was wound up after the lapse of more than one year from the date of the transfer, sect. 38 of the *Companies Act*, 1862, would prevent them being liable as contributories.

Ashton Cross, for depositors supporting the petition:—

The clauses in the scheme providing that preference shares and deposit receipts should be taken by creditors of the *Old Bank* in discharge of their debts should contain a reservation of the rights of the creditors against sureties, so that the scheme may not operate to release them from their liabilities.

VAUGHAN WILLIAMS, J.

Crackanthorpe, Q.C., and *W. D. Rawlins*, for creditors opposing the petition.

1893

In re LONDON CHARTERED BANK OF AUSTRALIA

1893. July 21. VAUGHAN WILLIAMS, J.:—

I allowed this matter to stand over in order that I might read the judgment of the Court of Appeal in *In re English, Scottish, and Australian Chartered Bank* (1), because, the scheme of arrangement in that case being very like the scheme submitted to me for sanction in this case, and the circumstances generally of the two banks not being dissimilar, I thought that it would greatly assist me in performing my duty in this case if I had the judgment of the Court of Appeal before me. I have now had the advantage of seeing that judgment, and am therefore able to dispose of this matter, and I hope in accordance with the decision of the Court of Appeal.

Lord Justice *Lindley*, after reading the well-known passage from his judgment in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* (2), goes on to clear up any matter in that judgment which might be doubtful. I do not say that there was anything doubtful in that judgment as it stood, but Sir *Horace Davey* argued very strongly that the effect of it was, that the Court, when called upon to sanction a scheme, had really no option but to register the decision of the creditors, unless the case was one which *ex facie* shewed that that which was resolved upon was wrong, or illegal, or that those who voted for the resolution were actuated by motives by which they ought not to have been influenced.

The passage of Lord Justice *Lindley's* judgment in *In re English, Scottish, and Australian Chartered Bank* which deals with this matter is as follows (3): "Now it is quite obvious from the language of the Act and from the mode in which it has been interpreted, that the Court does not simply register the resolution come to by the creditors or the shareholders as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be. I do not

(1) *Ante*, p. 785. (2) [1891] 1 Ch. 213, 239. (3) *Ante*, pp. 408, 409.

say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later. While, therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage." The judgments of Lords Justices *Lopes* and *A. L. Smith* are to the same effect.

It seems, therefore, that I ought to sanction the present scheme unless there is something *ex facie* wrong about it, or unless something is brought to my attention shewing that there has been some material oversight or miscarriage.

The scheme which is now brought before me is identical with the scheme in *In re English, Scottish, and Australian Chartered Bank* (1), except in a few particulars to which my attention was called by Mr. *Crackanthorpe*. He of course relied, though he did not argue at length, upon the objections which were at that time *sub judice* in *In re English, Scottish, and Australian Chartered Bank*, but he dealt at length with the points in which this scheme differed from the scheme in that case.

[His Lordship dealt with and overruled several objections to the scheme, and proceeded as follows:—]

I have now dealt with most of the points which were made by Mr. *Crackanthorpe*; and, notwithstanding those objections, I think I ought to sanction the scheme, because it is in substance the same scheme as that which the Court of Appeal approved in *In re English, Scottish, and Australian Chartered Bank*, the differences not being so great that they ought to induce me to refuse my sanction to the present scheme.

There are, however, two other matters to be dealt with, and, as they are likely to occur in other cases, I have thought it better

(1) *Ante*, p. 385.

VAUGHAN WILLIAMS, J

1893

In re LONDON CHARTERED BANK OF AUSTRALIA

to define accurately my views with regard to them. One of these points is, that this scheme ought not to be sanctioned without making provision that sureties shall not be released; the other is, that it ought not to be sanctioned without making provision that the shareholders in the *Old Bank* shall not, by transfer of their new shares, get rid of their liabilities.

Now, with regard to the first point, no one intends that the scheme shall deprive the creditors of the bank of their rights against those who have guaranteed payment of the deposits and current accounts due from the bank. The principle upon which it is anticipated that the scheme of arrangement might have that effect is, either that the effect of the scheme is satisfaction of the guaranteed debt, so that there no longer exists any debt which the sureties can be called on to pay, or because the remedy over which the sureties would have against the bank is inconsistent with the scheme of arrangement, which is intended to liquidate, once and for ever, all liabilities of the bank. The scheme contains no release of the bank or the contributories; it contains no covenant not to sue, and it is by operation of law that the scheme becomes effective to relieve the company and contributories from further liability than that contemplated or imposed by the scheme. The scheme of arrangement under the Act of 1870 is—as I have had occasion to point out in several cases—an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the pending winding-up, whether voluntary or under the Court, just as the *Bankruptcy Act*, 1869, allowed the creditors the substituted liquidation by arrangement under sect. 125, or composition under sect. 126, of that Act, for a pending bankruptcy. The discharge of the bankrupt in such case was statutory and not conventional, and therefore by operation of law. Just so here, under the Act of 1870. The discharge of the company or contributories under the *Joint Stock Companies Arrangement Act*, 1870, is by operation of law effected by the stay of actions imposed, after winding-up order, by sect. 87 of the Act of 1862, and, during voluntary liquidation, by an order for a stay under sect. 138 in the case of any action being brought. The effect of this stay, coupled with the stay of the winding-up proceedings excepting so far as necessary

for carrying out the scheme of arrangement, is to discharge the company and contributories from further liability. It seems to me, then, that, the discharge being clearly by operation of law consequent upon pending statutory liquidation, the principles laid down by Lord Justice *Mellish* in *In re Jacobs* (1) apply, and that, therefore, there is no need, and it would not be right, to introduce a reservation of rights against sureties into the scheme of arrangement. It seems to me, also, that it is unnecessary—at all events in a case where the arrangement is arrived at pending a winding-up by the Court or under supervision, as distinguished from a mere voluntary winding-up—to introduce into the order sanctioning the scheme any express words staying proceedings by creditors by action, or discharging contributories from further liability beyond that imposed by the scheme, because this is necessarily implied by the sanction by the Court of the scheme disposing of the whole of the assets of the company; but if those who ask for a reservation of rights against sureties wish to have an express order to stay, I do not know that there is any objection to this being done.

As to making provision that the old shareholders shall not escape liability by a transfer of the new shares while not fully paid, I have the assistance of the judgment of the Court of Appeal in *In re English, Scottish, and Australian Chartered Bank* (2). Lord Justice *A. L. Smith* says that it was pressed upon them "that in the scheme we are sanctioning there is no provision as in some of the other schemes whereby the existing shareholders are prevented from slipping out of their liabilities. If that is necessary, it seems to me that, as Mr. Justice *Vaughan Williams* still has control over the scheme, he can insert it or have it inserted in the articles of association." Lord Justice *Lindley*, dealing with the same point, says he must be guided as to the provisional character of the order by my observations as to being satisfied with the constitution and articles of the *New Bank*. I do not think that I can do anything which amounts to a modification of the scheme without submitting it again to the creditors; but I gather that the Court of Appeal does not think that the introduction of a term preserving the liability of the shareholders

(1) Law Rep. 10 Ch. 211. (2) *Ante*, pp. 385, 420.

VAUGHAN WILLIAMS, J

1893

In re LONDON CHARTERED BANK OF AUSTRALIA.

(the memorandum seems preferable to the articles, since the former cannot be altered) would be a modification of the scheme, although such a matter has been expressly dealt with in some schemes; and the introduction of such a provision into the memorandum might affect the practical working of the scheme, because the old shareholders might be deterred by such a provision from electing to take shares in the *New Bank*. But I have arrived at the conclusion that, in the present case, the introduction of such a provision would not affect the practical working of the scheme, because the old shareholders declining to take shares would have immediately to pay up £20 on the old shares. I think, therefore, I may treat the provision as machinery, and introduce it into the memorandum of association of the new company, and also into the articles.

Solicitors: *Freshfields & Williams; F. Brooke; Gellatly & Warton; Allen & Edwards; Burn & Berridge; Langlois & Co.; Clarke, Rawlins & Co.*

F. E.

END OF VOL. III.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1893, will be as follows:—

In the First Series,
[1893] 1 Ch. [1893] 2 Ch. [1893] 3 Ch.

In the Second Series,
[1893] 1 Q. B. [1893] 2 Q. B. [1893] P.

In the Third Series,
[1893] A. C.

INDEX.

ABANDONMENT—Undertaking—Tramway Company - - - - - 463
See TRAMWAY COMPANY. 1.

ACCOUNTS—Partnership—Share of deceased Partner - - - - 212
See PARTNERSHIP. 2.

ACCUMULATIONS—Maintenance of Infant—Vested life interest - - 1
See INFANT.

ADMINISTRATION—Estate of Testator [196, 282, 468, 496
See EXECUTOR 1—4.

AGENT—Excess of authority - - 130
See PRINCIPAL AND AGENT.

ANNUITY—Gift of—Duration—Payment out of interest and rents—Substitutionary Gift—"A. B or his descendants" 223
See WILL. 1.

ARBITRATION—Paving expenses—Apportionment - - - - - 22
See LOCAL GOVERNMENT. 3.

ASSIGNMENT—Attempted assignment—Forfeiture clause—Non-literal meaning [502
See WILL. 3.

BAILMENT—Deposit of money—Statute of Limitations - - - - 154
See LIMITATIONS, STATUTE OF. 1.

BANKER—Deposit—Death of partner—Novation—Surviving partner - - 426
See PARTNERSHIP. 1.

BUILDING—Covenant not to erect—Hoarding [158
See COVENANT.

BUILDING LINE—Taking down house - 36
See LOCAL GOVERNMENT. 1.

BUILDING SOCIETY—*Winding-up—County Court—Special Case—Jurisdiction—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 4, 32, *sub-s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 164—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 3, *sub-s* 3—*County Court Rules*, 1892, *r.* 140] In the winding-up in a

BUILDING SOCIETY—*continued.*
county court of a building society registered under the Building Societies Act, 1874, a special case for the opinion of the High Court of Justice may be stated under sect. 3, sub-sect. 3, of the Companies (Winding-up) Act, 1890:—*Semble*, that the enactments from time to time in force, for the winding up of companies in the Chancery Division of the High Court, apply to the winding up of building societies in the county court, whether such enactments became law before or after the Building Societies Act, 1874:—*Semble*, that sect. 164 of the County Courts Act, 1888, gives power to frame such rules only as regulate the practice of the county court. *In re* PORTSEA ISLAND BUILDING SOCIETY - - - 205

—— Mortgage to, by executor—Validity - 196
See EXECUTOR. 4.

CAPITAL—Application of, under Settled Land Acts - - - 74, 116, 161, 252
See SETTLED LAND ACTS. 1—4.

—— Income—Profits on shares - - 337
See TENANT FOR LIFE.

CASES—*Alabama, New Orleans, &c., Railway Company, In re* ([1891] 1 Ch. 218) followed - - - - - 385
See COMPANY. 5.

—— *Aslatt* v. *Corporation of Southampton* (16 Ch. D. 143) considered - - 510
See ELEMENTARY EDUCATION ACT.

—— *Barrow* v. *Barrow* (4 K. & J. 409) considered [474
See SETTLEMENT. 2.

—— *Bent* v. *Cullen* (LAW REP. 6 Ch. 235) considered - - - - - 222
See WILL. 1.

—— *Bright* v. *Walker* (1 C. M. & R. 211) approved - - - - - 48
See LIGHT. 1.

—— *Campbell's Case* (4 Ch. D 470) applied 307
See RAILWAY COMPANY.

CASES—*continued.*

—— *Chandler* v. *Pocock* (15 Ch. D 491) considered - - - - 244
See WILL. 2.

—— *Circuitt* v. *Perry* (23 Beav. 275) considered
See WILL 7. [348

—— *Clibborn* v. *Clibborn* (9 Ir. Jur. 381) considered - - - - 348
See WILL. 7.

—— *Cooper* v. *Wandsworth District Board of Works* (14 C. B. (N.S.) 180) considered
See LOCAL GOVERNMENT. 2. [483

—— *Dalison's Settled Estate, In re* ([1892] 3 Ch. 522) considered - - - 161
See SETTLED LAND ACTS. 3.

—— *Gardner* v. *London, Chatham and Dover Railway Company* (Law Rep. 2 Ch. 261) distinguished - - - 437
See TRAMWAY COMPANY. 2.

—— *Goodier* v. *Johnson* (18 Ch. D. 441) dictum adopted - - - - 455
See WILL. 5.

—— *Harris* v. *Harris* (Ir. Rep 3 Eq. 610) considered - - - - 348
See WILL. 7.

—— *Hawks* v. *Longridge* (29 L. T. (N.S.) 449) considered - - - - 348
See WILL. 7.

—— *Houghton Estate, In re* (30 Ch. D. 102) disapproved - - - - 252
See SETTLED LAND ACTS. 4.

—— *Humble* v. *Shore* (7 Hare, 247) overruled
See WILL. 8. [369

—— *Jenkinson* v. *Harcourt* (Kay, 688) distinguished - - - - 498
See EXECUTOR. 2.

—— *Kidderminster, Mayor of* v. *Hardwick* (Law Rep. 9 Ex. 13) followed - - 535
See CORPORATION.

—— *Mitchell* v. *Cantrill* (37 Ch. D. 56) distinguished - - - - 439
See LIGHT. 2.

—— *New Zealand Trust and Loan Company, In re* ([1893] 1 Ch. 403) explained 233
See TRUSTEE.

—— *North London Railway Company* v. *Great Northern Railway Company* (11 Q. B. D. 30) considered - - - 510
See ELEMENTARY EDUCATION ACT

—— *Perry* v. *Eames* ([1891] 1 Ch. 658) approved
See LIGHT. 1. [48

—— *Pettyt* v. *Jameson* (6 Madd. 146) discussed and applied - - - - 212
See PARTNERSHIP. 2

—— *Potinger* v. *Wightman* (3 Mer. 67) explained - - - - 490
See DOMICIL.

—— *St. James and St. John, Clerkenwell (Vestry of)* v. *Feary* (24 Q. B. D. 703) considered - - - - 483
See LOCAL GOVERNMENT. 2.

—— *Sandgate District Board of Health* v. *Keene* ([1892] 1 Q. B. 831) distinguished 22
See LOCAL GOVERNMENT. 3.

CASES—*continued.*

—— *Seaton* v. *Seaton* (13 App. Cas. 61) commented on - - - - 474
See SETTLEMENT. 2.

—— *Tredwell, In re* ([1891] 2 Ch 640) distinguished - - - - 363
See SETTLEMENT. 1.

—— *Wells, In re. Wells* v. *Wells* (43 Ch. D. 281) approved - - - 1
See INFANT

—— *Wilder* v. *Pigott* (22 Ch. D. 263) considered
See SETTLEMENT. 2. [474

CHAPEL—Building of—Settled Land Act 252
See SETTLED LAND ACTS. 4.

CHARGING ORDER—Maintenance of Lunatic
See LUNATIC. [332

COMPANY—*Issue of Paid-up Shares—Registered Contract—Consideration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-s.* 4—*Companies Act*, 1837 (30 & 31 *Vict. c.* 131), *s.* 25.] A company limited by shares, formed under the Companies Act, 1862, has no power to issue shares as fully paid up, as a free gift or bonus, to its shareholders, although a contract to do so has been made without any fraudulent intent and registered under sect. 25 of the Companies Act, 1867—A company formed under the Companies Act, 1862, was carried on for some years as a private company, all the shares which were issued being in the hands of a limited number of shareholders. It was then decided to throw the company open to the public; but before doing so, the company passed resolutions to allot a certain number of shares as fully paid to the directors and original shareholders. Accordingly, a contract was executed between the company and the shareholders, and registered under the 25th section of the Companies Act, 1867, by which it was agreed that those shares should be allotted to the directors and shareholders in consideration of their past services and expenses in forming the company and establishing the business; and on the registration of this contract the shares were allotted as agreed. The company proved unsuccessful and was wound up. The liquidator placed the directors and the original shareholders on the list of contributories for the shares so allotted as unpaid shares:—*Held* (affirming the decision of Wright, J.), that on the evidence no payment either in money or money's worth had been made for the shares, and that the directors and shareholders must be held liable for the full nominal value of the shares. *In re* EDDYSTONE MARINE INSURANCE COMPANY - - - C. A. 9

2. —— *Winding-up—Costs of successful Litigant—General Costs of Liquidation—Realization—Costs—Priority.*] An application by certain persons to be struck off the list of contributories of a company in liquidation having been successful, the liquidator, who had opposed the application, was ordered to pay their costs out of the assets of the company. The assets in the hands of the liquidator, including calls made and recovered subsequently to the date of the order, were insufficient to satisfy both the Applicants' costs and the costs of the liquidation:—*Held*, that the Applicants' costs were payable in

COMPANY—*continued.*

priority to the costs of the liquidation other than the liquidator's costs of realization.—As a general rule a liquidator who fails in litigation should be ordered to pay costs without regard to the question whether the assets are sufficient to reimburse him. *In re* STAFFORDSHIRE GAS AND COKE COMPANY - - - - - - - 523

3. —— *Winding-up—Fraudulent Preference—Set-off—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.] U., a director of a company, held shares not fully paid up, and his director's fees were unpaid. The company was admittedly in embarrassed circumstances. On the 21st of July, 1891, on which day the company's balance at its bankers was £2 0*s.* 11*d.*, U. gave to the company a cheque for £70, the amount remaining unpaid on his shares, and received at the same time from the company a cheque for a like amount on account of his fees, signed by himself and M., another director. Within three months a winding-up petition was presented, on which a winding-up order was made. The liquidator took out a summons for an order on U. and M. to pay the £70 to him on the ground that its payment was a fraudulent preference:—*Held*, that in applying sect. 48 of the Bankruptcy Act, 1883, to limited companies in pursuance of sect. 164 of the Companies Act, 1862, the special legislation applicable to such companies must be regarded, and that though a set-off of mutual debts within three months of the bankruptcy of an individual is not a fraudulent preference, such a set-off within three months of the presentation of a petition to wind up a company is a fraudulent preference, inasmuch as the right of set-off continues in bankruptcy, but not in winding-up:—*Held*, further, on the facts, that the payment was a fraudulent preference, and that U. and M. must pay the amount. *In re* WASHINGTON DIAMOND MINING COMPANY - - - - - - - C. A. 95

4. —— *Winding-up—Scheme of Arrangement—General Effect—Preserving Rights against Sureties—Transfer to New Company—Preserving Liability of Old Shareholders—Staying Proceedings against Old Company—Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] A scheme of arrangement sanctioned by the Court under the Joint Stock Companies Arrangement Act, 1870, is an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the winding-up, whether voluntary or under the Court, and it is by operation of law that the scheme becomes effective to relieve the company and its contributories from further liability than that which is contemplated or imposed by the scheme; their discharge being effected by the stay of actions imposed by sect. 87 of the Companies Act, 1862, after a winding-up or supervision order, and by an order to stay under sect. 138 of the same Act in the case of a voluntary winding-up—coupled with the stay of the winding-up proceedings excepting so far as necessary for carrying out the scheme.—It is, therefore, unnecessary to insert in the scheme a reservation of the rights of sureties for the company's debts, or to insert in the order sanctioning it—at all events in a winding-up by

COMPANY—*continued.*

order or under supervision of the Court—any express words staying proceedings by creditors, or discharging contributories from further liability than that imposed by the scheme.—Where the scheme contemplates the formation of a new company to take over the assets of the liquidating company, and shareholders in the old company are allowed to take shares, not fully paid up, in the new company in respect of shares as to which they are liable in the winding up, the Court may, as a condition of sanctioning the scheme, require the insertion, in the memorandum of association of the new company, of a clause preventing them from escaping liability by transferring their new shares. *In re* LONDON CHARTERED BANK OF AUSTRALIA - - - - - - 540

5. —— *Winding-up—Scheme of Arrangement—Meeting of Creditors—Proxies—Creditors Abroad—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 15, *sub-s.* 3; *s.* 80.] A chartered banking company, the principal business of which was in Australia, stopped payment, and was ordered to be wound up in this country. A scheme of reconstruction was proposed, by which a new bank was to be established, which was to defray the liabilities of the old bank with certain exceptions. The Judge directed meetings of the shareholders and creditors to be held in order to ascertain their wishes as to the scheme. It being necessary that this should be done without delay, and the great majority of the creditors being resident in Australia, the Judge made an order directing a form of proxy to be sent by the Official Receiver by telegraph to Australia appointing specified persons to vote for or against the scheme at the London meeting; the proxy papers were to be executed by the creditors in Australia and deposited at the offices of the company at the principal cities in Australia not later than three days previous to the meeting in London, and the particulars and number of the proxies for and against the scheme were to be telegraphed to the Official Receiver. This was done, and the result declared at the meeting in London, when it was found that more than the statutory number of the creditors, including the Australian creditors, were in favour of the scheme, but that if the Australian votes were not counted the resolution in favour of the scheme would not have been carried. Under these circumstances the Judge sanctioned the scheme. Some of the Scotch and English creditors appealed from this decision on the grounds (1.) that the scheme was improvident and unfair towards the creditors generally; (2.) that the Judge had no power to order the result of the Australian proxies to be communicated by telegram to the meeting, but that the proxies ought to have been produced at the meeting; (3.) that the Australian proxy papers were irregular in naming a particular person as agent for the voter; (4.) that as to some of the proxy papers, which were stamped with a penny stamp, the day of the meeting at which they were to be used was not inserted, and, therefore, they were void under sect. 80 of the Stamp Act, 1891:—*Held* (affirming the decision of

COMPANY—*continued.*

Vaughan Williams, J.), (1.) that following the principles laid down in *In re Alabama, New Orleans, Texas, and Pacific Junction Railway Company* ([1891] 1 Ch. 213), as there was nothing unreasonable or unfair in the scheme as between different classes of creditors, the Court would defer to the expressed opinion of the great majority of the creditors; (2.) that the Judge had power under the Joint Stock Companies Arrangement Act, 1870, s. 2, to direct the particulars of the Australian proxies to be telegraphed to the Official Receiver and the proxies to be counted at the meeting, there being no necessity that the proxy papers should be produced at the meeting; (3.) that the proxy papers were not irregular on account of the agent being named on the form; and (4.) that the proxies on which the day of meeting was not named would be good if stamped with a ten shilling stamp within thirty days of their being received in England under sect. 15, sub-sect. 3, of the Stamp Act, 1891. *In re* English, Scottish, and Australian Chartered Bank - - C. A. 385

6. —— *Winding-up—Voluntary Winding-up—Enforcement of Calls—Powers of Directors—Companies Act,* 1862 (25 & 26 *Vict c.* 89), *s.* 133, *sub-s.* 5; *s.* 139.] A general meeting of a company in voluntary liquidation has power to elect directors and sanction the exercise by them of powers of enforcing payment of calls by sale or forfeiture of shares. *In re* Fairbairn Engineering Company. Ladd's Case - - 450

—— Profits—Dividends—Whether income or capital - - - - 337
See Tenant for Life.

CONTRACT FOR SHARES—Paid-up shares—Consideration - - - 9
See Company. 1.

CONVERSION—Power of sale—Trust to re-invest in land - - - - 244
See Will. 2.

—— Power to postpone sale—Non-appropriation to answer legacy - - - 468
See Executor. 3.

—— Trust for sale void for remoteness—Right of beneficiaries to elect to take property as real estate - - - 421, 455
See Will. 5, 6.

CORPORATION—*Common Seal—Executory Contract—Ratification—Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *s.* 22, *sub-s.* 2.] A lessee of buildings belonging to a municipal corporation wrote letters on the 10th and 13th of May, 1892, to the mayor and the chairman of the public improvements committee of the corporation—which had not been appointed under seal—offering to surrender his lease, pull down the existing buildings, and erect new buildings, provided the corporation would grant him a new lease on specified terms—On the 13th of May, 1892, the town clerk wrote to the lessee that the committee accepted his proposals, subject to the council's approval.—On the 27th of May, 1892, the lessee wrote to the town clerk modifying the terms of his original proposals.—On the 1st of June, 1892, the council approved, but not under

CORPORATION—*continued.*

seal, the committee's acceptance of the original proposals, and this approval was communicated to the lessee by letter.—On the 21st of July, 1892, the Defendant, by letter, withdrew his proposals:—*Held*, that the contract, not having been under the seal of the corporation, or signed on their behalf by any person authorized under seal to do so, or ratified under seal, or part performed or acted on, could not be enforced by the corporation.—*Mayor of Kidderminster* v. *Hardwick* (Law Rep. 9 Ex. 13) followed. Mayor, Aldermen, and Citizens of Oxford *v.* Crow - 535

COSTS—Lands Clauses Act—Reinvestment of purchase-money - - - 151
See Lands Clauses Act.

—— Liquidation of company—Costs of successful litigant and general costs of liquidation - - - - - 523
See Company. 2.

CO-SURETY—Contribution between co-sureties
See Principal and Surety. [238

COUNTY COURT—Winding-up of building society—Practice—Jurisdiction - - 205

COVENANT—"*Building*"—*Hoarding—Breach—Injunction.*] The conveyance of part of a residential estate contained a covenant by the grantee that any "building" which should be erected on the land should be of a certain height and have a stuccoed front and slated roof, and be used only as a dwelling-house:—*Held*, that the erection of an advertisement hoarding was not prohibited by the covenant. Foster *v.* Fraser 158

CREDITORS—Meeting of—Foreign Creditors—Proxies - - - - 385
See Company. 5.

CROWN—Prerogative of—Light—Lessee of servient tenement—Prescription - 48
See Light. 1.

DAMAGES—Inquiry as to - - - 122
See Practice. 1.

DEBENTURES—Issue at a discount—Railway company - - - - 307
See Railway Company.

—— Receiver and manager—Tramway company
See Tramway Company. 2. [437

DEPOSIT—Bankers—Renewal on death of a partner—Novation - - - 426
See Partnership. 1.

—— Parliamentary—Repayment on abandonment - - - - - 463
See Tramway Company. 1.

—— Statute of Limitations - - 154
See Limitations, Statute of. 1.

DEVASTAVIT—Payment of debt barred by Statute of Limitations - - 282
See Executor. 1.

DIRECTORS—Powers of, during voluntary winding-up - - - - 450
See Company. 6

DOMICIL—*Infant—Fatherless Infant—Change of Mother's Domicil.*] The change in the domicil

DOMICIL—*continued.*
of a fatherless infant which may follow from a change of domicil on the part of the mother is not to be regarded as the necessary consequence of a change of the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising even when she changes her own domicil.—Mrs. B., a widow with several infant children, all of whom had a Scotch domicil, married again in Scotland in November, 1834. In January, 1835, Mr. N., her second husband, went to reside permanently in England, and shortly afterwards Mrs. N. and all her children, except C. B., joined him in England and acquired an English domicil. C. B. remained in Scotland with an aunt, with whom she had lived since her father's death in 1821. C. B. attained twenty-one in May, 1840, and she died in Scotland in April, 1841:—*Held*, that C. B.'s mother had abstained from exercising her power of changing C. B.'s domicil when she changed her own, and that the domicil of C. B. at the time of her death was Scotch.—*Potinger* v. *Wightman* (3 Mer. 67) discussed and explained. *In re* BEAUMONT - - - - 490

EASEMENT—Light - - - - 48
See LIGHT. 1.

ELECTION—Real or personal estate - 421
See WILL. 6.

—— To confirm settlement—Wife's chose in action - - - - 474
See SETTLEMENT. 2.

ELEMENTARY EDUCATION ACT—*Jurisdiction—Injunction—Legal Remedy—Quo Warranto—Personal Status—School Board Member—Absence from Meetings for Six Months—Illness—Disqualification—Election of New Member—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—33 & 34 *Vict. c.* 75, *Sched. II., Part. I., r.* 14.] Where, independently of the Judicature Act, 1873, s. 25, sub-s. 8, there is a legal right which can be asserted either at law or in equity, a Court of Equity has jurisdiction under that sub-section to grant an injunction in protection of that right. For instance, where a member of a school board has been improperly declared disqualified for the office, he may apply for and obtain an injunction from a Court of Equity restraining the board from proceeding to elect a new member in his place, notwithstanding that he has a remedy at law by quo warranto.—*Aslatt* v. *Corporation of Southampton* (16 Ch. D. 143) and *North London Railway Company* v. *Great Northern Railway Company* (11 Q. B. D. 30) considered.—Rule 14 in Schedule II., Part I., to the Elementary Education Act, 1870, under which a member of a school board ceases to be a member "if he absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board," does not entitle the board to proceed to the election of a new member in the place of a member who has absented himself on account of ill-health, without first giving the defaulting member an opportunity of explaining or excusing his absence. RICHARDSON *v.* METHLEY SCHOOL BOARD - - - - - - 510

ESTATE AGENT—Building house for—Settled Land Act - - - - - 252
See SETTLED LAND ACTS. 4.

ESTATE TAIL—Disentailing deed—Estates in defeasance - - - - 79
See TENANT IN TAIL.

EXECUTOR—*Administration—Debt barred by the Statute of Limitations—Payment against wish of Co-executor—Devastavit—Administration Summons—Res Judicata—Liability of Solicitor.*] Although it has been established as a general rule that an executor may pay a debt barred by the Statute of Limitations without being guilty of a devastavit, he may not pay such a debt after it has been judicially declared by a Court of competent jurisdiction that it is barred by the statute.—Whether an executor may pay a debt barred by the statute against the declared wish of his co-executor, *quære.*—If an action is brought against several executors for the recovery of a debt due to the testator and they plead different inconsistent pleas, that plea is to be enforced by the Court which is most for the benefit of the estate.—An administration summons was taken out by an alleged creditor against two executors, S. and M. S. filed an affidavit stating that the debt was owing, and that he was willing to pay it. M., who was also general legatee, filed an affidavit pleading the Statute of Limitations. The Judge decided that the debt was barred by the statute, and dismissed the summons. S. then, by the advice of his solicitor, notwithstanding this judgment, paid the debt out of the assets to the solicitor, who paid it to the creditor:—*Held*, in an action by M. against S., the creditor, and the solicitor (affirming the decision of Romer, J.), that S. committed a devastavit by payment of the debt, and that S., the creditor, and the solicitor were liable to repay the money to the testator's estate. MIDGLEY *v.* MIDGLEY [C. A. 282

2. —— *Administration—Exoneration of Personal Estate—Judgment Debt—Land belonging to Tenant in Tail delivered in Execution—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *ss.* 11, 13—*Real Estate Charges Acts* (*Locke King's Acts*), (17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69).] Land belonging to a tenant in tail in possession was delivered in execution to judgment creditors of his under a writ of elegit. The judgment debtor died, and gave no direction exonerating his personal estate from payment of the debt:—*Held*, that, as the Real Estate Charges Acts were not applicable, the judgment debt was not chargeable on the land in exoneration of the personal estate. —*Jenkinson* v. *Harcourt* (Kay, 688) distinguished. *In re* ANTHONY. ANTHONY *v.* ANTHONY - 498

3. —— *Administration—Legacy—Power to postpone Sale and Conversion of Estate—Non-appropriation to answer Legacy—Trustee entitled to Share in Residue—Increased Value of outstanding Estate—Right of Legatee to Share in Increase of Funds.*] A testator by his will gave his real and residuary personal estate upon trust for sale and conversion, and as to the sum of £20,000, part of the trust moneys, upon trust for his son C. for life, with remainder to C.'s children, giving the residue of the trust moneys

EXECUTOR—*continued.*
between his other two sons, and giving his trustees a discretionary power to postpone the sale and conversion of the estate so long as seemed to them expedient.—The trustee, who was one of the residuary legatees, neither paid nor appropriated funds to meet the legacy of £20,000, but retained the trust estate in its original state of investment, meanwhile paying C. interest at 4 per cent. upon the amount of the legacy.—The investments of the estate having risen considerably in value, C. and his children, more than ten years after the death of the testator, claimed to participate in the increase of value, on the ground that the trustee, being a residuary legatee, could not retain profits caused by his own default:—*Held*, that the residuary legatees must be treated as owners of the estate, subject to a charge thereon of the legacy, and that C. and his children were only entitled to the amount of their legacy with interest at 4 per cent. from the end of the year after the death of the testator. *In re* CAMPBELL. CAMPBELL *v.* CAMPBELL - - - - - - 468

4. —— *Assent to Legacy—Leaseholds—Mortgage to Building Society.*] The mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds and other property—not specially out of or on account of the rents—is not, in the absence of representations on the subject by the executor to the legatee, sufficient to enable the Court to infer that the legacy has been assented to.—An executor is not entitled, on behalf of the estate, to take shares in a building society, or to make the estate liable for him as a shareholder therein; but a mortgage by an executor to a building society, though made to secure, not only money advanced and interest thereon, but all moneys becoming due from him as a shareholder, is not wholly void as against the beneficiaries, but is good to the extent of the money advanced and reasonable interest thereon, provided the advance was made in good faith to the executor in that capacity. THORNE *v.* THORNE - - 196

EXONERATION—Personal estate - - 498
See EXECUTOR. 2.

FORFEITURE CLAUSE—Settlement - 363
See SETTLEMENT. 1

—— Will - - - - - - 502
See WILL 3.

FORGERY—Mortgage—Pledge by agent—Excess of authority - - - 130
See PRINCIPAL AND AGENT.

FRAUDULENT PREFERENCE—Winding up of company—Set-off - - - 95
See COMPANY. 3.

HOARDING—Covenant not to erect building
See COVENANT. [156

HUSBAND AND WIFE—Settlement—Wife's reversionary chose in action—Confirmation - - - - - - 474
See SETTLEMENT. 2

IMPLICATION—Trust for husband till bankruptcy or death—Gift over on death—Interim income - - - 363
See SETTLEMENT. 1.

IMPROVEMENT COMMISSIONERS—Removal of projecting signs—Notice - - 483
See LOCAL GOVERNMENT. 2.

IMPROVEMENTS—Settled Land Acts 74, 116. [161, 352
See SETTLED LAND ACTS. 1—4

INCOME—Capital—Profits on shares - 337
See TENANT FOR LIFE.

INFANT—*Vested Life Interest—Income—Accumulations—Right to Fund accumulated during Minority—Remaindermen—Contrary Intention—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s* 43, *sub-ss.* 2, 3.] By a will which contained no maintenance or accumulation clauses applicable to residue, a testator gave to his granddaughter A an immediate vested life interest in a share of his residuary estate, with remainder to her children. At the time of the testator's death in 1883, A. was an infant, and under the powers of the Conveyancing Act, 1881, s. 43, the trustees applied part of the income of her share for her maintenance and accumulated the remainder. A. married in 1887, and subsequently attained twenty-one, and there was issue of the marriage.—It was contended on behalf of her infant child that the accumulations between the death of the testator and the marriage of A. must, under sub-sect. 2 of sect 43 of the Conveyancing Act, 1881, be treated, not as income payable to A., but as capital to be invested for the benefit of herself for life, and afterwards for her children as the persons who ultimately became entitled to the property from which such accumulations arose:—*Held* (affirming the judgment of North, J.), that the gift of an immediate vested life interest to A. was an expression of a "contrary intention" within sub-sect. 3 of sect. 43, so as to exclude the operation of sub-sect. 2, and that A. was absolutely entitled to the accumulations.—*In re Wells* (43 Ch. D. 281) approved. *In re* HUMPHREYS. HUMPHREYS *v.* LEVETT [C. A. 1

—— Fatherless—Domicil—Change of mother's domicil - - - - 490
See DOMICIL.

INJUNCTION—Exclusion of member of school board and election of new member 510
See ELEMENTARY EDUCATION ACT.

INTEREST—Legacy—Payable at twenty-one
See WILL 4. [518

—— Sale of Land—Wilful default in completing purchase - - - - 260
See VENDOR AND PURCHASER. 2.

JUDGMENT DEBT—Execution on land—Exoneration of personal estate - 498
See EXECUTOR 2.

JURISDICTION—County court—Winding up of Building Society - - - 205
See BUILDING SOCIETY.

—— Injunction to enforce legal right - 510
See ELEMENTARY EDUCATION ACT.

LANDS CLAUSES ACT—*Railway Company—Compulsory Purchase of Land—Re-investment of Purchase-money—Costs—Petitioner's Costs limited to Costs of Summons—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Rules of Supreme Court*, 1883, *Order LV., r.* 2.] A petition was presented for the transfer to the official trustees of charitable funds of three sums of stock which had respectively arisen from the investment of the purchase-moneys paid by three railway companies for land belonging to a charity which they had taken under their statutory powers. The three sums of stock respectively amounted to £1244, £44, and £36:—*Held*, that the costs payable by each of the two companies, whose purchase-moneys were represented by the two smaller sums of stock, must be limited to the amount which the company would have had to pay in case the application had been made by summons. ATTORNEY-GENERAL *v.* ST. JOHN'S HOSPITAL, BATH - - - - 151

LEASE—By tenant for life—Settled Land Acts *See* SETTLED LAND ACTS. 5. [169

—— Reservation of right to obstruct light 439 *See* LIGHT.

LEGACY—Assent of executor to - - 196 *See* EXECUTOR 4.

—— Interest before twenty-one—Appropriated legacy - - - - 518 *See* WILL. 4.

—— Neglect to appropriate funds to legacy 468 *See* EXECUTOR. 3.

LEGAL RIGHT—Injunction to enforce—Exclusion of member of school board - 510 *See* ELEMENTARY EDUCATION ACT.

LIGHT—*Prescription—Indefeasible Right—Lessee of Servient Tenement—Reversioner—Crown—Surrender—Presumption of Lost Grant—Injunction—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 1, 2, 3.] In July, 1852, the Plaintiff purchased and took a conveyance of the freehold of a piece of land on which he had, in the same year, built two houses. In September, 1892, the Defendants, who had, in 1891, purchased a Crown lease, which had been granted in 1826 by the Commissioners of Woods and Forests under their statutory powers, of certain adjoining buildings for the residue of a term which would expire in 1914, surrendered the lease to the Crown upon the terms of an agreement with the Crown and the Commissioners that they, the Defendants, should erect new buildings in place of the old, and that, on completion, the Commissioners should grant them a new lease. The Defendants then proceeded to pull down the old buildings and erect new ones, which, the Plaintiff complained, would obstruct the ancient lights in his houses. No new lease had yet been granted to the Defendants under their agreement.—In an action brought by the Plaintiff against the Defendants for an injunction to restrain them from obstructing his ancient lights, the Plaintiff contended that he had acquired an indefeasible right to light, not only as against the Defendants as lessees, but also as against the Crown as reversioner:—*Held* (affirming the decision of Kekewich, J.), (1.) that sect. 2 of the Prescription Act (2 & 3 Will. 4, c. 71) does not apply to the easement of light; (2.) that

LIGHT—*continued.*

sect. 3, which applies to light, does not bind the Crown; and (3.) that under the circumstances no lost grant of light could be presumed as against the Crown or its lessees.—But *held* (reversing the decision of Kekewich, J.), (4.) that as the Plaintiff could not establish a right against the Crown as reversioner, he could not establish a right against the lessees, inasmuch as an easement, if acquired by prescription, either at common law or under the statute, must be absolute and not for a term of years.—*Perry* v. *Eames* ([1891] 1 Ch. 658) and *Bright* v *Walker* (1 C. M. & R. 211) approved. WHEATON *v.* MAPLE & CO. [C. A. 48

2. —— *Prescription—Reservation in Lease of Right to Obstruct Light—"Adjoining or Contiguous"—Covenantee—"Assign"—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.] The Plaintiffs were lessees, under four leases, dated the 17th of February, 1870, from the Ecclesiastical Commissioners, for a term of sixty years from the 25th of December, 1867, of four houses on the south side of a street in London. The street was thirty-one feet wide. At the date of the leases there were on the north side of the street, opposite to the Plaintiffs' houses, four old houses, also belonging to the Commissioners, which were thirty and a half feet in height. The Plaintiffs' houses were nearly forty-four feet in height. Each of the Plaintiffs' leases contained a declaration that "notwithstanding anything herein contained, the lessors shall have power, without obtaining any consent from, or making any compensation to, the lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect, or suffer to be erected, on such adjoining or contiguous premises, any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee, or the tenants or occupiers of the hereditaments hereby demised." The leases provided that "the word 'lessors' shall be taken to mean and include the Ecclesiastical Commissioners, their successors and assigns, and other the reversioner or reversioners for the time being of the premises, so far as the same will admit, unless the context or nature of the case may require a different construction." From the date of the leases, until the building by the Defendant which is about to be stated, a period of more than twenty years, no alteration was made in the houses opposite the Plaintiffs' houses. On the 19th of July, 1892, an agreement was entered into between the Commissioners and the Defendant, by which, in consideration of his pulling down and rebuilding the four old houses opposite to the Plaintiffs' houses, in accordance with plans to be approved by the Commissioners, they agreed to grant to the Defendant leases of the sites of the old houses and the buildings to be erected thereon. In pursuance of this agreement the Defendant pulled down the old houses, and was, with the approval of the Commissioners, building new ones, which had already reached a height of fifty-three and a half feet, and were intended to be, when completed, about five or six feet higher.

LIGHT—*continued.*

It was admitted that the new buildings would obstruct the Plaintiffs' light:—*Held*, (1.) that the above clause in the Plaintiffs' leases prevented them from acquiring a right to light under sect. 3 of the Prescription Act; (2.) that the Plaintiffs' leases and the Defendant's agreement respectively passed by implication the subsoil of the street, usque ad medium filum viæ (subject to the rights of the local authority in the surface of the street), and that therefore the Defendant's premises were "adjoining or contiguous" to those of the Plaintiffs; (3.) that the Defendant was an "assign" of the benefit of the agreement between the Commissioners and the Plaintiffs:—*Held*, therefore, that the Defendant was entitled to build so as to obstruct the Plaintiffs' lights.—*Mitchell* v. *Cantrill* (37 Ch. D. 56) distinguished. HAYNES v. KING - - - - - 439

LIMITATIONS, STATUTE OF—*Bailment—Deposit of Money*—21 *Jac.* 1, *c.* 16, *s.* 3.] Time does not begin to run under the Statute of Limitations (21 Jac. 1, c. 16) against a person who has entrusted money to another for safety till demand, though it was contemplated that the bailee might use the money in business. *In re* TIDD. TIDD v. OVERELL - - - - - - 154

2. —— *Mortgage—Sale—Negligence of Mortgagee—Fraud of Agent—Payment of Interest by Agent—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*The Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.] In 1878 A., the first mortgagee of property, sold under his power of sale, and employed S., a solicitor, to conduct the sale for him. S. received the sale moneys, and, after satisfying A.'s mortgage debt, retained the surplus of the sale moneys, falsely representing to A. that he had the authority of the second mortgagee to receive the same. S. applied the surplus to his own use, and from 1878 to 1891 paid the second mortgagee interest on the second mortgage as though it were still existing. In 1891 S. became bankrupt, when the true facts transpired. In an action by the second mortgagee against A., claiming an account of the sale moneys, and payment of what was due to him on his second mortgage:—*Held*, (1.) that under the circumstances the payment of interest by S. did not keep alive the claim of the second mortgagee against A., because S. did not make the payments as A.'s agent; (2.) that although A. had been guilty of negligence in not seeing that S. paid over the surplus sale moneys to the second mortgagee, yet he was not party or privy to the fraud of S.; and (3.) consequently that the claim was barred by the Statute of Limitations and the Trustee Act, 1888, s. 8. THORNE v. HEARD - - - - - - - 530

—— Executor—Payment of debt barred by statute - - - - 282
See EXECUTOR. 1.

LIQUIDATION—Company—General costs of—Costs of successful litigant - 523
See COMPANY. 2.

LOCAL GOVERNMENT—*Building Line—Taking Down House—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 155.] The owner of a house in a street took out the front wall of the ground and first floors, and removed the first floor, with the

LOCAL GOVERNMENT—*continued.*

view of turning the two lowest storeys into one lofty shop, which was also to be extended behind the house. The second floor was not disturbed, but was shored up with timber, which was afterwards replaced by iron girders and brick piers. Shortly after the erection of the iron girders and piers had been completed the urban authority prescribed a building line under the Public Health Act, 1875, s. 155, and commenced an action to restrain the owner from building in front of it:—*Held*, by Kekewich, J., that the house had been substantially taken down, and that the powers of sect. 155 arose; but that the urban authority had not prescribed the line in due time, and could not prevent the Defendant from maintaining the building he had erected:—*Held*, by the Court of Appeal, that, inasmuch as a substantial part of the house and of its front wall was left standing, neither the house nor the front thereof had been taken down within the meaning of sect. 155, and that the power to fix a building line had never arisen. ATTORNEY-GENERAL v. HATCH - - - C. A. 36

2. —— *Improvement Commissioners—Jurisdiction—Projecting Signs affixed to Houses—Statutory Power to order Removal—Notice to Owner—Right of Owner to be heard before Order made*—6 *Will.* 4, *c.* xxv. *s.* 82.] A local Act of Parliament appointing improvement commissioners for a town, provided that the occupiers of houses in the said town should within fourteen days of receiving notice in writing from the commissioners, cause all signs and projections affixed to their houses, and which, in the judgment of the commissioners, should be considered public annoyances or nuisances by reason of their projecting into or encroaching upon, or otherwise annoying or endangering the public passage along any of the streets within the said town, to be taken down or otherwise altered; and in case any occupier should neglect or refuse to comply with any such notice, then the commissioners might cause the sign or projection to be taken down or altered forthwith by any person acting under their authority:—*Held*, that the commissioners, in exercising their discretion under the Act, were not bound to act as a court, and give the owner of the sign an opportunity of being heard before them previously to serving him with a notice to remove it, and that the proper course of the owner, if he objected to the notice, was to give notice of his objection to the commissioners and require them to hear him upon it.—*Cooper* v. *Wandsworth District Board of Works* (14 C. B. N.S.) 180) and *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (24 Q. B. D. 703) considered. ATTORNEY-GENERAL v. HOOPER - 483

3. —— *Streets—Paving Expenses—Apportionment—Dispute as to Apportionment—Arbitration—Right to sue—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] Sect. 150 of the Public Health Act, 1875, empowers an urban authority to compel the owners of premises abutting on any street which requires repairing to make good the street, and in default to execute the work themselves and recover the expenses from the owners in default "according to the frontage of their respective premises, and in such proportion as is

LOCAL GOVERNMENT—*continued.*
settled by the surveyor of the urban authority, or (in case of dispute) by arbitration." A defaulting owner, on receiving notice of apportionment, sent to the authority a letter which appeared to be rather an objection to the prime cost of the work than to the mode in which that prime cost was apportioned:—*Held*, by Wright, J., that a dispute as to the prime cost was not a dispute as to the apportionment within the section, and that the urban authority were not bound to go to arbitration before commencing an action to recover the apportioned amount.—*Sandgate District Local Board of Health* v. *Keene* ([1892] 1 Q. B. 831) distinguished.—*Held*, by the Court of Appeal, that the letter might have been treated by the urban authority as not being a notice disputing the apportionment, but that as they had in letters to the owner, and by resolution passed at their own meeting, treated the letter as a good notice, it must be treated as such, and that an action brought by them before proceeding to arbitration must be dismissed.—Another owner disputed the claim of the urban authority in general terms:—*Held*, by Wright, J., that this was a dispute as to the apportionment, and that the urban authority could not sue without first going to arbitration. MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF FOLKESTONE v. BROOKS. SAME v. LADD - - - - - - C. A. 22

LUNATIC—*Maintenance—Charging Order.*] The Court will order a proper allowance for the maintenance of a lunatic to be made out of the income and capital of a fund in Court belonging to him, though the effect may be to make the capital insufficient for the payment of creditors of the lunatic who have obtained charging orders on the fund, and such creditors are not entitled to have impounded an amount of capital sufficient to meet their demands. *In re* PLENDERLEITH - 332

—— Trustee—Appointment of new trustee—Vesting order - - - 233
See TRUSTEE

MAINTENANCE—Infant—Accumulations 1
See INFANT.

—— Lunatic - - - - - - 332
See LUNATIC.

MANSION-HOUSE—Lease by tenant for life—Settled Land Acts - - - 169
See SETTLED LAND ACTS. 3.

—— Rebuilding—Application of capital moneys—Settled Land Acts - - 252
See SETTLED LAND ACTS. 4.

MORTGAGE—Executor—Building society 196
See EXECUTOR. 4.

—— Forged deed—Deposit of title-deeds—Excess of authority - - - - 130
See PRINCIPAL AND AGENT.

—— Sale — Fraudulent application of surplus proceeds of sale by solicitor—Statute of Limitations - - - - 530
See LIMITATIONS, STATUTE OF. 2.

NEGLIGENCE—Mortgagee selling under power of sale—Misapplication of surplus proceeds of sale - - - - 530
See LIMITATIONS, STATUTE OF. 2.

NOTICE—Removal of projecting signs—Local board - - - - - 483
See LOCAL GOVERNMENT. 2.

NOVATION—Surviving partner—Bankers—Renewal of deposit note - - 426
See PARTNERSHIP. 1.

PARTICULARS—Plaintiff's claim—Inquiry as to damages - - - - 128
See PRACTICE. 1.

PARTIES—Legal personal representative—Order dispensing with representative - 146
See PRACTICE. 2.

PARTNERSHIP—*Bankers—Depositors—Death of a Partner—Fresh Deposit Note—Liability of Deceased Partner's Estate—Novation.*] The acceptance by a customer, from the surviving partner, of a fresh deposit note for the balance of a debt due from a firm, one of whose partners is dead, is not sufficient evidence of novation to discharge the estate of the deceased partner. *In re* HEAD. HEAD v. HEAD - - - 426

2. —— *Value of Share of deceased Partner—Direction to ascertain by Reference to last signed Annual Account—Death after expiration of Partnership Year before taking or signing Account.*] Partnership articles provided for annual accounts and balance-sheets to be taken on the 31st of March in each year, or as near thereto as conveniently might be, and to be signed by the partners; and also provided that the share of a partner dying should be taken by the surviving partners at the amount appearing to his credit in "the last annual balance-sheet which should have been signed previously to his death."—A partner died on the 10th of April, 1891, at which time no account had been taken for the year ending on the 31st of March, 1891:—*Held* (affirming the judgment of Romer, J.), that the amount of the deceased partner's share must be determined according to an account to be taken for the year ending on the 31st of March, 1891, and not according to the balance-sheet for the year before, which was the last annual balance-sheet actually signed by the partners.—The decision in *Pettyt* v. *Jameson* (6 Madd. 146) discussed and applied. HUNTER v. DOWLING - - - C. A. 212

PAVING EXPENSES—Apportionment - 22
See LOCAL GOVERNMENT. 3.

PERPETUITY—Trust for sale void for remoteness - - - - 421, 455
See WILL. 5, 6.

POWER OF SALE—Exclusion of—Settled Estates Act - - - - 430
See SETTLED ESTATES ACT.

PRACTICE—*Inquiry as to Damages—Particulars of Plaintiffs' Claim.*] An inquiry as to damages sustained by the Plaintiffs by reason of the Defendant's breach of his covenant in restraint of trade having been directed, and an order for an affidavit of documents by Defendant having been made:—*Held*, by North, J., that the Plaintiffs must give a statement in writing of the heads under which they sought to recover damages from the Defendant, and that the time for the affidavit of documents must be extended for fourteen days after the Plaintiffs' statement:—*Held*, on appeal,

PRACTICE—*continued.*

that, as the Plaintiffs were ignorant of the particulars of breaches of covenant, the order would be useless, as they could only comply with it by stating every imaginable ground of damage, and the order was therefore discharged. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY *v.* NORDENFELT - - - - C. A. 122

2. —— *Parties—Legal Personal Representative—Estate of Deceased Person—Proceeding in Absence of Representative—Order dispensing with Representative—Binding on Estate of Deceased Person—Rules of Supreme Court*, 1883, *Order XVI., r.* 46; *Order LV.*] When an order is made under Order XVI., rule 46, it should appear on the face of the order, to render it binding on the estate of a deceased person, either that the Court, having had its attention called to this point, has dispensed with the legal personal representative of the deceased person interested in the matter, or has appointed some person to represent the estate. *In re* RICHERSON. SCALES *v.* HEYHOE (No. 2) [146

3. —— *Service out of the Jurisdiction—Notice of Motion—Rules of Supreme Court*, 1883, *Order XI., r.* 1; *Order LII., r.* 9.] Unconditional appearance to a writ served out of the jurisdiction is submission to the jurisdiction as to the whole claim, though part of it is outside Order XI., rule 1.—On motion to discharge an order giving leave to serve a writ out of the jurisdiction (part of the claim only being within Order XI., rule 1), the order was allowed to stand; but it was ordered that the Plaintiffs should not be entitled to relief on the part of the claim outside Order XI., rule 1.—*Semble*, the Court cannot allow notice of motion for an injunction to be served outside the jurisdiction with the writ. MANITOBA AND NORTH-WEST LAND CORPORATION *v.* ALLAN - 432

—— County court—Winding up of building society - - - - 205
See BUILDING SOCIETY.

—— Sale by Court—Form of conveyance—Protection of purchaser - - 376
See VENDOR AND PURCHASER. 1.

—— Trustee Acts—Vesting order - - 233
See TRUSTEE.

PREROGATIVE—Crown—Ancient lights 48
See LIGHT. 1.

PRESCRIPTION—Light—Prerogative of Crown
See LIGHT 1. [48

—— Light—Reservation in lease of right to obstruct light - - - - 539
See LIGHT. 2.

PRINCIPAL AND AGENT—*Excess of Authority—Liability of Principal—Mortgage—Authority to pledge Title-deeds for a particular Sum—Forged Deeds—Redemption.*] The owner of land deposited the title-deeds with the U. Bank to secure an advance of £750. Being desirous of obtaining a further advance of £1500, he authorized his son to borrow £2250 from another bank and gave him a written authority to receive the deeds from the U. Bank on payment of the sum due to them. The son fraudulently pledged the deeds to a different bank from that which had been proposed for a much larger advance than he was authorized

PRINCIPAL AND AGENT—*continued.*

to borrow, forging his father's name to a promissory note and deposit note. Out of this advance he paid £750 to the U. Bank, and £1500 to his father, and kept the rest for his own use. The son afterwards induced the Defendants to advance him a still larger sum, out of which the advance by the bank was paid off, and the land was conveyed to the Defendants by forged deeds by way of mortgage for securing the advances. The Defendants had no notice of the fraud, and the dealings with the property were kept secret from the father. Subsequently the son absconded, and the facts then became known to the father. He brought an action against the Defendants claiming to redeem the property on payment of the sum of £2250 which he had authorized his son to borrow:—*Held* (affirming the decision of Wright, J.), that the Plaintiff, having placed the deeds in the control of his son, could not redeem the property without paying the whole amount which his son had raised upon them; although the son had exceeded his authority in raising more than he was instructed to raise, and had effected his purpose by forgery. BROCKLEBBY *v.* TEMPERANCE PERMANENT BUILDING SOCIETY - C. A. 130

PRINCIPAL AND SURETY—*Contribution between Co-Sureties.*] F., with E. and B., as his sureties, gave a bond to a society to secure the payment of a sum at the end of five years, and of interest in the meantime. It was provided (inter alia) that if E. and B., or either of them should die, and if F. did not within a month procure a solvent person to enter into a further bond to the same effect as the present one, the principal should become immediately payable. E. died, and a fresh bond was entered into by F., B and H., to the same effect as the former bond, with an additional provision that the giving it should not release the heirs, executors, or administrators of E., or in any way alter, vary, or lessen their liability, or affect any right or remedy of the society under the first bond.—B. and H paid the debt and applied to prove against the estate of E. Bacon, V.C., held that they were entitled to prove for half what they had paid. E.'s executors appealed, contending that E.'s estate was released, and if not, that it was liable to B. and H. only for one-third of what they had paid:—*Held*, by the Court of Appeal, that E.'s estate was not released, but that it was liable only for one-third, and not for one-half, of what B. and H. had paid. *In re* SIR J. J. ENNIS. COLES *v.* PEYTON - C. A. 238

PROXY—Meeting of creditors—Scheme of arrangement—Stamp - - 385
See COMPANY. 5.

PURCHASE-MONEY—Lands Clauses Act—Re-investment - - - - 151
See LANDS CLAUSES ACT.

PURCHASER—Protection of, against puisne incumbrances—Sale by Court - 376
See VENDOR AND PURCHASER. 1.

RAILWAY COMPANY—*Issue of Stock at a Discount—Issue of Debentures at a Discount—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16)—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *s.* 21—*Railway Companies Act*,

RAILWAY COMPANY—*continued.*

1867 (30 & 31 *Vict. c.* 127), *s.* 27—*Companies Clauses Act*, 1869 (32 & 33 *Vict. c.* 48), *s.* 5.] A company governed by the Companies Clauses Consolidation Act, 1845, and the Acts amending it, may issue fully paid-up original stock at a discount, and for payment either in cash, or for land or labour or other consideration, subject to the liability of the directors for issuing the stock below its value without necessity.—Whether such a company can issue shares liable to calls at a discount, *quære.*—Such companies may also issue debentures or debenture stock at a discount, if authorized to borrow money or raise money by mortgages or debentures—The principle of *Campbell's Case* (4 Ch. D. 470) is applicable to such companies as well as to companies constituted under the Companies Acts, 1862 and 1867. —An agreement by a railway company with bankers to issue to them paid-up stock and debentures at a discount, in consideration of a large advance of money by them, *held* under the circumstances valid and reasonable.—The decision of Romer, J., affirmed. WEBB *v.* SHROPSHIRE RAILWAYS COMPANY - - - C. A. 307

—— Lands Clauses Act—Reinvestment of purchase-money - - - 151
See LANDS CLAUSES ACT.

RECEIVER—Debenture-holders—Tramway company - - - - - 437
See TRAMWAY COMPANY. 2.

RECITAL—Erroneous—Property excepted from residuary gift - - - 348
See WILL. 7.

REMOTENESS Trust for sale void for remoteness - - - - 421, 455
See WILL. 5, 6.

RENT-CHARGE—Settled Land Act—Improvements—Tenant for life - - 161
See SETTLED LAND ACTS. 3.

RES JUDICATA—Debt barred by Statute of Limitations—Debt afterwards paid by executor - - - 282
See EXECUTOR. 1.

RESIDUE—Excepted property—Intention to exclude - - - - 348
See WILL. 7.

—— Share of—Revocation of gift of, and direction that it should fall into the residue
See WILL. 8. [369

REVOCATION—Gift of share of residue—Direction that it should fall into the residue
See WILL. 8. [369

RULES OF COUNTY COURTS, 1892, r. 146 205
See BUILDING SOCIETY.

RULES OF SUPREME COURT, Order XI., r. 1
See PRACTICE. 3. [432

—— Order XVI., r. 46 - - - 146
See PRACTICE. 2.

—— Order LII., r. 9 - - - - 432
See PRACTICE. 3.

—— Order LV. - - - - 146
See PRACTICE. 2.

—— Order LV., r. 2 - - - - 151
See LANDS CLAUSES ACT.

SALE BY COURT—Conditions of sale—Puisne incumbrances—Protection of purchaser
See VENDOR AND PURCHASER. 1. [376

SCHEME OF ARRANGEMENT—General effect—Rights of creditors, contributories, and sureties - - - - 540
See COMPANY. 4.

—— Meeting of creditors—Proxies - 385
See COMPANY. 5.

SEAL—Contract not under—Corporation—Ratification - - - - 535
See CORPORATION.

SERVICE—Out of jurisdiction—Submission to jurisdiction - - - - 432
See PRACTICE. 3.

SET-OFF—Winding-up of company—Fraudulent preference - - - - 95
See COMPANY. 3.

SETTLED ESTATES ACT—*Will—Trust for Sale—Exclusion of Statutory Power of Sale—"Express Declaration"—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 38.] A testator by his will created a trust for sale of estates which he thereby settled for the benefit of his wife and children. And he stated that it was his earnest desire that his mineral lands should remain in his family for a considerable number of years, so that they might enjoy the benefit to be derived from the development thereof. And he expressed his will to be, that the trust for sale should not be exercised, in so far as it related to his mineral lands, until after the decease of the survivor of his present sons and daughters.—The sons and daughters mentioned in the will being still living, a petition was presented under the Settled Estates Act, 1877, asking that the trustees for the time being of the will might be authorized to sell the whole or any part of the settled estates. There were minerals under parts of the estates. The trustees of the will were two ladies, one of whom was a widow, and the other was unmarried. They joined in the petition:—*Held*, that the direction contained in the will was not, within the meaning of sect. 38 of the Settled Estates Act, 1877, an "express declaration" that the powers conferred by the Act should not be exercised, and that, notwithstanding that direction, the Court had power under the Act to authorize the trustees to sell the estates.—But the Court refused to confer the authority upon two ladies, and the petition was ordered to stand over with a view to the appointment of other trustees. *In re* PEARS'S SETTLED ESTATES - - - - 430

SETTLED LAND ACTS—*Capital Money—Improvements—Tenant for Life—Provision in Settlement for Repayment by Tenant for Life of Money raised for Improvements—Inconsistency with Powers of Settled Land Act*, 1882—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 51.] By a settlement of family estates, made in 1877, the trustees were empowered by the direction of the tenant for life, to raise money by mortgage of the settled lands, to be applied by him for the purpose of improvements thereon similar in the main to those authorized by the Settled Land Act, 1882; and the annual rents of the settled lands were charged with the payment to the trustees.

SETTLED LAND ACTS—*continued.*

for twenty-five years from the raising of the money, of an annual sum equal to one-twenty-fifth of the money paid to the tenant for life, who was to be bound to pay such annual sum, and to keep down the interest on the charge.—Under the powers of the settlement money had been raised for improvements by direction of the tenant for life, and he had made certain annual payments towards the sinking fund created by the settlement:—*Held*, (1.) that the money standing to the credit of the sinking fund was capital money under sect. 38 of the Settled Land Act, 1882, and applicable as such. (2.) That the provision obliging the tenant for life to recoup the money expended on improvements was not void as inconsistent with the exercise of the powers of the Settled Land Act, 1882, within the meaning of sect. 51 thereof; and (3.) That the tenant for life was not precluded from resorting to the powers of the Settled Land Act, 1882; but having already resorted to the powers of the settlement, was meanwhile bound to continue his payments to the sinking fund thereby created. *In re* SUDBURY AND POYNTON ESTATES. VERNON *v.* VERNON - - - - - - 74

2. —— *Capital Money—Improvements—Prospective Order*—45 & 46 *Vict. c.* 38, *s.* 26, *sub-s.* 2 (*iii.*)] Tenants for life who desired to sell an estate in building lots submitted to the trustees a scheme, which the trustees approved, for laying out roads and sewers, at an estimated expense of £2100. The trustees had no capital moneys in hand. The tenants for life applied to the Court for an order authorizing the trustees to apply £2100 out of capital moneys to come to their hands for the construction of the roads and sewers:—*Held* (affirming the decision of Kekewich, J.), that a prospective order of this kind could not be made, for that according to the true construction of the Act the payment by the trustees could only be sanctioned upon evidence that the work had been properly done, and what amount was properly payable by the trustees in respect thereof. *In re* MILLARD'S SETTLED ESTATES - - - - - - C. A. 116

3. —— *Capital Money — Improvements — Tenant for Life—Application of future Capital Money for past Improvements—Rent-charges—Settled Land Acts*, 1882, *ss.* 21, 25; 1887, *s.* 1; 1890, *s.* 15.] The Court will not, under s. 15 of the Settled Land Act, 1890, make a prospective order directing future capital money to be applied in repayment to the tenant for life of money expended by him on permanent improvements he has already executed, or in repayment to him of moneys paid, or to be paid, in keeping down rent-charges created by him for raising money for such improvements.—*In re Dalison's Settled Estate* ([1892] 3 Ch. 522) considered. *In re* MARQUIS OF BRISTOL'S SETTLED ESTATES - 161

4. —— *Capital Moneys — Improvements — Mansion-house—Chapel—Stables—Agent's House —Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s. vii.*—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-ss. ii., iv.*] The question whether any particular application of capital money under the Settled Land Acts should be sanctioned by the Court must be determined entirely by the code of rules laid down in the Settled Land Acts, and not by reference to the decisions as to the application of purchase-money under the Lands Clauses Act. A scheme was proposed by a tenant for life for the application of "capital moneys" under the powers of the Settled Land Acts in the following improvements: (1.) Building additions to the mansion-house and improving its architectural appearance. (2.) Building a chapel for Roman Catholic service. (3) Building new stables, the present stables being inconvenient and insufficient. (4.) Building a house for the residence of the estate agent.—*Held* (affirming the decision of Chitty, J.), that none of the proposed improvements were such as the Acts authorized for the application of capital moneys.—*In re Houghton Estate* (30 Ch. D. 102) disapproved.—*Semble*, the limitation of half the annual income of the settled land placed upon the expense of re-building a mansion-house by the Settled Land Act, 1890, sect. 13, sub-sect. iv., refers to the whole of the land subject to the settlement, and not to the particular estate on which the house is situate. *In re* LORD GERARD'S SETTLED ESTATE [C. A. 252

5. —— *Lease by Tenant for Life—Bonâ fide Exercise of Power—Rights of Way over Park usually occupied with principal Mansion-house—Lease to Wife of Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 53, 54—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10—12 & 13 *Vict. c.* 26.] The tenant for life of a settled estate, for the purpose of giving his wife a dower or jointure house, in 1889 granted her a lease for twenty-one years of a house called X., about three miles from the principal mansion-house on the T. estate, of which estate X. formed part, together with rights of way over all roads and drives which from time to time should exist on the T. estate. The drives then existing were about twenty-five miles long, and extended over the estate generally, including the park usually occupied with the mansion-house and up to the gate and door of such mansion-house. At the same time, and substantially as part of the same transaction, the tenant for life granted to his wife a building lease for ninety-nine years of a piece of land forming part of a portion of the T. estate never previously used as building ground, and inconvenient for such a purpose, together with the right of way over certain drives, including the carriage-drive over and up to X. Any house on the building site would overlook and destroy the privacy of X. It was part of the arrangement that the two leases should be renewed every few years, so as to ensure that, so far as possible, the terms should begin to run from the death of the tenant for life. In May, 1891, the two leases were renewed on the same terms. Neither the old nor the new leases were substantially acted on during the life of the tenant for life. After the death of the tenant for life the lessees brought an action to have the validity of the leases established:—*Held*, (1.) that the leases were invalid, because they were not granted in the bonâ fide exercise of the leasing powers of the tenant for life having "regard to the interests of

SETTLED LAND ACTS—*continued.*

all parties entitled under the settlement" within the meaning of sect. 53 of the Settled Land Act, 1882; (2.) that, having regard to sect. 6 of the Settled Land Act, 1882, and sect. 10 of the Settled Land Act, 1890, the lease of X. was invalid by reason of its granting rights of way over the park and lands usually occupied with the principal mansion-house; and (3.) that the lease of X. could not be regarded as a valid contract for a lease without the rights of way under 12 & 13 Vict. c. 26.—*Semble*, that a tenant for life may grant a lease to a married woman although she is his own wife. DOWAGER DUCHESS OF SUTHERLAND *v.* DUKE OF SUTHERLAND - 169

SETTLEMENT—*Forfeiture Clause — Trust for Husband till Bankruptcy or Death—Limitation over on Death of Husband—Implication—Interim Income.*] By a marriage settlement certain funds belonging to the wife were settled upon trust to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or alienate the same or until his death, whichever should first happen; and after the decease of the survivor of the wife and husband, then upon trust for the children of the marriage. The husband became a liquidating debtor, and then the wife died, leaving her husband surviving. —*Held*, that the limitation over had taken effect, and that the income of the trust fund between the death of the wife and the death of the husband belonged to the children. *In re Tredwell* ([1891] 2 Ch. 640) distinguished. *In re* AKEROYD'S SETTLEMENT. ROBERTS *v.* AKEROYD [C. A. 363

2 —— *Husband and Wife — Ante-nuptial Agreement—Wife's Reversionary Chose in Action —Interest derived under Instrument made before Malins' Act* (20 & 21 *Vict. c.* 57)—*Election to confirm Settlement.*] A husband and wife had, previously to their marriage, entered into an agreement for the settlement of all the wife's property, including a policy of insurance on the life of another to which she was entitled under an instrument made before Malins' Act. A memorandum in writing of this agreement was signed before the marriage by the husband alone, and the settlement therein referred to was, after the marriage, also executed by the husband, but not by the wife. By it the husband and wife covenanted to assign to trustees all her property upon trust for the wife for life, and after her death as she should appoint, and in default of appointment for the children of the marriage, and if there should be none for the husband. By a subsequent deed acknowledged by the wife under the Fines and Recoveries Act the policy was assigned and certain real estate of the wife's was conveyed to the trustees of the settlement. The wife subsequently, in exercise of her power under the settlement, mortgaged the policy:—*Held*, that the wife by acting on the contract and taking the benefit of it had elected to confirm the settlement, and was bound in equity to perform it fully, and that consequently the mortgage was valid.—Neither the decision in *Seaton* v. *Seaton* (13 App. Cas. 61) nor the observations of Lord Herschell in that case are inconsistent with *Barrow* v. *Barrow* (4 K. & J. 409) and *Wilder* v. *Pigott* (22 Ch. D. 263). GREENHILL *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY [474

SHARES—Paid-up—Registered contract—Consideration - - - - 9
See COMPANY. 1.

—— Profits on, when income - - 337
See TENANT FOR LIFE.

SIGNS — Projecting — Powers of improvement commissioners - - - 483
See LOCAL GOVERNMENT. 2.

SOLICITOR—Appointed by vendor to produce deeds and receive purchase-money 269
See VENDOR AND PURCHASER. 2.

STABLES—Rebuilding—Settled Land Act 252
See SETTLED LAND ACTS. 4.

STAMP—Proxy to be used at meeting of creditors —Foreign creditors - - 385
See COMPANY. 5.

STATUTES.

21 Jac. 1, *c.* 16—*Limitation of Actions* - 530
See LIMITATIONS, STATUTE OF. 2.

—— —— s. 3 - - - - 154
See LIMITATIONS, STATUTE OF. 1.

2 & 3 Will. 4, *c.* 71, *s.* 1, 2, 3—*Prescription*
See LIGHT. 1. [48

—— —— s. 3 - - - - 539
See LIGHT. 2.

3 & 4 Will. 4, *c.* 74, *s.* 15—*Fines and Recoveries*
See TENANT IN TAIL. [79

1 & 2 Vict. *c.* 110, *ss.* 11, 13—*Judgments*
See EXECUTOR. 2.

8 & 9 Vict. *c.* 16—*Companies Clauses* - 307
See RAILWAY COMPANY.

8 & 9 Vict. *c.* 18, *s.* 80—*Lands Clauses Act*
See LANDS CLAUSES ACT. [151

12 & 13 Vict. *c.* 26—*Leases* - - 169
See SETTLED LAND ACTS. 5.

13 & 14 Vict. *c* 60, *s.* 26—*Trustee Act* - 233
See TRUSTEE.

17 & 18 Vict. *c* 113—*Locke King's Act* - 498
See EXECUTOR. 2.

20 & 21 Vict. *c.* 57—*Wife's Reversion* - 474
See SETTLEMENT. 2.

25 & 26 Vict. *c.* 89, *s.* 38, sub-*s.* 4—*Companies*
See COMPANY. 1. [9

—— —— s. 91 - - - - 385
See COMPANY. 5.

—— —— s. 133, sub-*s.* 5; *s.* 139 - - 450
See COMPANY. 6.

—— —— s. 164 - - - - 95
See COMPANY. 3.

26 & 27 Vict. *c.* 118, *s.* 21—*Companies Clauses*
See RAILWAY COMPANY. [307

30 & 31 Vict. *c.* 69—*Locke King's Act* - 498
See EXECUTOR. 2.

30 & 31 Vict. *c.* 127, *s.* 27—*Railway Companies*
See RAILWAY COMPANY. [307

30 & 31 Vict. *c.* 131, *s.* 25—*Companies* - 9
See COMPANY. 1.

32 & 33 Vict. *c.* 48, *s.* 5—*Companies Clauses*
See RAILWAY COMPANY. [307

STATUTES—*continued.*

33 & 34 Vict. c. 75, Sched. II., Part I., r. 14—*Elementary Education* - - 510
See ELEMENTARY EDUCATION ACT.

38 & 34 Vict. c. 104, s. 2—*Joint Stock Companies Arrangement Act* - - 385, 540
See COMPANY. 4, 5.

36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Judicature Act* - - - - - 510
See ELEMENTARY EDUCATION ACT.

37 & 38 Vict. c. 42, ss. 4, 32, sub-s. 4—*Building Societies* - - - - 205
See BUILDING SOCIETY.

38 & 39 Vict. c. 55, s. 150—*Public Health* 22
See LOCAL GOVERNMENT. 3.

—— —— ss. 155 - - - - 36
See LOCAL GOVERNMENT. 1.

40 & 41 Vict. c. 18, s. 38—*Settled Estates Act*
See SETTLED ESTATES ACT. [430

44 & 45 Vict. c. 41, s. 43, sub-ss. 2, 3—*Conveyancing Act* - - - 1
See INFANT.

—— —— s. 56 - - - - 289
See VENDOR AND PURCHASER. 2.

—— —— s. 70 - - - - - 376
See VENDOR AND PURCHASER. 1.

45 & 46 Vict. c. 38, ss. 6, 53, 54—*Settled Land Act* - - - - - - 169
See SETTLED LAND ACTS. 5.

—— —— s. 21, sub-s. vii. - - 252
See SETTLED LAND ACTS. 4.

—— —— ss. 21, 25 - - - 161
See SETTLED LAND ACTS. 3.

—— —— s. 26, sub-s. 2 (iii.) - - 116
See SETTLED LAND ACTS. 2.

—— —— s. 51 - - - - - 74
See SETTLED LAND ACTS. 1.

45 & 46 Vict. c. 50, s. 22, sub-s 2—*Municipal Corporations* - - - 535
See CORPORATION

46 & 47 Vict. c. 52, s. 48—*Bankruptcy* - 95
See COMPANY. 3.

50 & 51 Vict. c. 30, s. 1—*Settled Land Act*
See SETTLED LAND ACTS 3. [161

51 & 52 Vict. c. 43, s. 164—*County Courts*
See BUILDING SOCIETY. [205

51 & 52 Vict. c. 59, s. 2, sub-s. 1—*Trustee Act*
See VENDOR AND PURCHASER. 2 [269

—— —— s. 8 - - - - - 530
See LIMITATIONS, STATUTE OF. 2.

53 & 54 Vict c. 5, s. 136, sub-ss. 2, 5, 6; s. 139—*Lunatics* - - - - 233
See TRUSTEE.

53 & 54 Vict c 63, s. 3, sub-s. 3—*Companies (Winding-up)* - - - 205
See BUILDING SOCIETY.

53 & 54 Vict. c. 69, s. 10—*Settled Land Act*
See SETTLED LANDS ACTS. 5. [169

—— —— s. 13, sub-s. ii., vi. - - 252
See SETTLED LAND ACTS. 4.

—— —— ss. 15 - - - - 161
See SETTLED LAND ACTS 3.

STATUTES—*continued.*

54 & 55 Vict. c. 39, s. 15, sub-s. 3; s. 80—*Stamp Act* - - - - 385
See COMPANY. 5.

55 & 56 Vict. c. 27, s. 1, sub-s 2—*Parliamentary Deposits* - - - 463
See TRAMWAY COMPANY. 1.

STOCK—Issue at a discount—Railway Company
See RAILWAY COMPANY. [307

STREET—Building line - - - 36
See LOCAL GOVERNMENT. 1.

—— Paving expenses - - - 22
See LOCAL GOVERNMENT. 3.

TENANT FOR LIFE—*Company—Profits—Income or Capital—Tenant for Life and Reversioner.*] A testator gave his estate upon the usual trusts for conversion and investment, with a power to postpone conversion, and a direction that during the interval all income produced by the property in its actual state should be treated as income for the purposes of his will. He bequeathed one-third of the residue to A. for life, and after her death upon further trusts. Part of the residue consisted of £10 shares in a company with £8 per share paid up Some years after the testator's death the company was wound up and reconstituted, and the new company paid for the testator's shares £9 5s. apiece, being £1 5s. per share more than had been paid up. This excess arose from two funds. One of them consisted of profits which the directors had retained to meet contingencies. The other was a fund which by the articles was created by retaining the excess of dividend over £10 per cent. in every year in which it exceeded that amount, and was to be applied in making up the yearly dividend to £5 per cent. in any year in which it should fall short of that amount:—*Held* (by the Vice-Chancellor of the County Palatine), that the £1 5s per share on the shares to the income of which A. was entitled belonged to her as income.—*Held*, on appeal, that the right of a tenant for life of shares is only to receive dividends and bonuses in the shape of dividends declared during his life, and that the £1 5s. per share, though it was profits, was not income to which the tenant for life was entitled, but must go as capital. *In re* ARMITAGE. ARMITAGE *v.* GARNETT - C. A. 337

—— Settled Land Acts—Improvements 74, 116, [161, 252
See SETTLED LAND ACTS. 1-4

—— Settled Land Act—Lease by - - 169
See SETTLED LAND ACTS. 5.

TENANT IN TAIL—*Will—Limitations of Real Estate—Postponement Clause—Disentailing Deed—Estates "in Defeasance of" Estate Tail—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), s. 15.] Sect. 15 of 3 & 4 Will. 4, c. 74, enables every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, to dispose of for an estate in fee simple the entailed lands as against (amongst others) all persons whose estates are to take effect "in defeasance of" the estate tail vested in the person making the disposition, "saving always the rights of all persons in

TENANT IN TAIL—*continued.*

respect of estates prior to the estate tail in respect of which such disposition shall be made." Lands were devised in trust for A. for life, remainder to his first and other sons successively in tail male, with similar remainders over to B. and C., younger brothers of A., and their respective first and other sons successively in tail male, and the will contained a proviso that upon the happening of a specified event the trusts in favour of B. and his issue male "should thenceforth be postponed to, and take effect in remainder next immediately after" the trusts in favour of C. and his issue male. A. being tenant for life in possession under the will, B. and his eldest son, with A.'s consent, executed a disentailing deed conveying the lands in fee simple. Subsequently, during the continuance of A.'s life estate, the event specified in the proviso happened, and upon A.'s death C.'s eldest son became, unless barred by the disentailing deed, entitled to the lands, under the proviso, as tenant in tail in possession:—*Held*, that the true effect of the proviso was to make, on the happening of the specified event, the estate limited to C. and his issue male an estate "in defeasance of," and not "prior to," the estate tail of B. and his issue male, and therefore that the estate of C.'s eldest son was barred, under the statute, by the disentailing deed. MILBANK *v.* VANE - - - - C. A. 79

TITLE DEEDS—Pledge of, by agent—Excess of authority - - - - 130
See PRINCIPAL AND AGENT.

TRAMWAY COMPANY—*Parliamentary Deposit—Abandonment of Undertaking—Repayment of Deposit—Creditors, Meritorious and non-Meritorious—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1, *sub-s.* 2.] All distinction between meritorious and non-meritorious creditors as to the right, upon the abandonment of an undertaking, to share in the deposit made by the promoters in order to obtain from the Board of Trade the provisional order authorizing the undertaking, has, since the passing of the Parliamentary Bonds and Deposits Act, 1892, ceased to exist. Persons who lent the money to the promoters of the undertaking to enable them to make the deposit, are "creditors" entitled, under s. 1, sub-sect. 2, of that Act, upon the abandonment of the undertaking, to share in the deposit fund pari passu with the other creditors of the company. The word "creditors" in sub-sect. 2 is not limited to the creditors of the particular undertaking which has been abandoned, but includes the general creditors of the company. *Ex parte* BRADFORD AND DISTRICT TRAMWAYS COMPANY - - - - - - 463

2. —— *Public Undertaking—Statutory Company—Mortgage Debentures—Receiver and Manager.*] A receiver and manager was appointed of the undertaking of a tramways company.—*Gardner* v. *London, Chatham and Dover Railway Company* (Law Rep. 2 Ch. 201) distinguished. BARLETT *v.* WEST METROPOLITAN TRAMWAYS COMPANY - - - - - - 437

TRUST—To reinvest in land—Conversion 244
See WILL. 2.

TRUSTEE—*Appointment of New Trustees—Practice—Trustee of Unsound Mind—Vesting Order, Form of—Government Stock—Transfer into Names of New Trustees—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-ss.* 2, 5, 6; *s.* 139—*Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 26.] Where the stock or shares with reference to which a vesting order is being made under the Lunacy Act, 1890, s. 136, are Government or other stocks or shares upon which there is no liability for calls, and which are to be held by the trustees, the order should as a rule go on to direct the persons in whom the right to transfer, or call for a transfer, and to receive the dividends or income, is vested, to transfer the stock or shares into their own names. But where shares are being dealt with on which there is a liability to calls such directions should be omitted. Under the Trustee Act, 1850, and also under the Lunacy Act, 1890, it is competent for a Judge to make an order in either form, according to the special circumstances of the case. The form of order adopted in *In re New Zealand Trust and Loan Company* ([1893] 1 Ch. 403) explained. *In re* GREGSON C. A. 233

—— Power to postpone conversion—Non-appropriation to answer legacy - - 468
See EXECUTOR. 8.

—— Sale of land by—Conveyance produced by solicitor, appointed as his agent—Refusal of purchaser to pay purchase-money - - - - 269
See VENDOR AND PURCHASER. 2.

VENDOR AND PURCHASER—*Sale by Court—Practice—Puisne Incumbrances—Conditions of Sale—Form of Conveyance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70—*Protection of Purchaser.*] By an order in an administration action the trustees of certain land were ordered to sell it with the approval of the Judge, and the first mortgagees were to be at liberty to retain all the purchase-money in reduction of their charge. There were puisne incumbrances, the persons entitled to which were not parties to the proceedings. The property was sold in lots under conditions of sale which stated that the first mortgagees would join in the conveyance to the purchasers and release the property from their debt, but that as the debt to the first mortgagees exceeded the probable amount of the purchase-money no subsequent incumbrance would be abstracted or released; and that the purchaser should not require the concurrence in the conveyance of any person having only an equitable interest bound by the order for sale, other than the vendors who are selling as trustees. The first mortgagees, who consented to join in the conveyance, wished to insert in the grant to the purchasers the words, "according to their estate and interest in the premises and not further or otherwise," and the words, "subject to such right or equity of redemption, if any, as is subsisting in the said hereditaments, and is not by these presents conveyed or released":—*Held* (reversing the decision of Kekewich, J.), that the purchasers were protected against the equitable interests of the puisne incumbrancers by the 70th section of the Conveyancing and Law of Property

VENDOR AND PURCHASER—*continued*

Act, 1881, and that they were entitled to an absolute conveyance of the estate in fee simple without any qualifying words, and to a declaration that the subsequent incumbrancers were bound by the order of the Court MOSTYN *v* MOSTYN - - - - - C A 376

2 —— *Trustee Vendor — Absent Trustee — Solicitor—Attorney—Conditions of Sale—Interest —"Wilful Default"—Conveyancing and Law of Property Act*, 1891 (44 & 45 *Vict c* 41), *s* 56—*Trustee Act*, 1888 (51 & 52 *Vict c* 59), *s* 2, *sub s* 1] On the 14th of September, 1892, vendors contracted to sell a piece of freehold land subject to the condition, that "if from any cause whatever other than the wilful default of the vendors" the purchase should not be completed by the day fixed for completion, the purchaser should pay interest on the purchase-money until completion The property was subject to a mortgage to two trustees, one of whom, P, a solicitor, had gone abroad before the date of the contract, having given to his partner a general power of attorney, authorizing him to execute deeds and transfer any property held by P as trustee or mortgagee The vendors knew that it would be difficult to communicate with P, but, relying on the sufficiency of the power of attorney, they fixed the 10th of November, 1892, for the completion of the purchase The purchaser, however, declined to complete without a conveyance from P himself, alleging that, notwithstanding sect 2 of the Trustee Act, 1888, there was no person to whom the mortgage money could safely be paid A conveyance from P was ultimately obtained, but owing to the delay thus caused the purchase was not completed until the 1st of March, 1893, and the vendors claimed interest on the purchase money from the 10th of November, 1892 —*Held*, by the Court of Appeal (affirming the decision of Kekewich, J), (1) that the case was not within sect. 2 of the Trustee Act, 1888 and that the purchaser was justified in refusing to complete without a release from P, and (2) that the delay in completion was attributable the wilful default of the vendors, and that they were not entitled to any interest on the purchase-money *In re* HETING AND MERTON'S CONTRACT - - - C A 269

VESTING ORDER — Trustee Acts — Lunatic trustee - - - 233
See TRUSTEE

VOLUNTARY WINDING-UP - - 450
See COMPANY 6

WILFUL DEFAULT—Delay in completing purchase—Interest - - - 269
See VENDOR AND PURCHASER 2

WILL—*Annuity, Duration of Payment out of Interest and Rents—Gift of Annuity "to A B or his Descendants"—Substitutionary Gift*] A testator gave all his real and personal property "upon trust to pay out of the interest and rents arising from the same the following sums of money I give to my wife £250 per annum to H H M or to his descendants, £250 per year, also to P M or his descendants, £250 per year,

WILL—*continued*

to Mrs A A H or her descendants, £250 per year to Mrs S P, £50 per year to Mrs S S S, 10s per week With regard to the residue of the interest and rents after the above payments have been made," the testator gave it in tenths and twentieths for certain charitable purposes in England and the United States —*Held*, by Stirling, J, (1) that the annuities were given to the various annuitants for their respective lives only, and (2) that the gifts for charitable purposes included the corpus Upon appeal on the first point only —*Held* (affirming the judgment of Stirling, J), that the annuitants took their annuities for life only, and as to H H M, P M, and A A H, with substitutionary gifts to the respective descendants, if any, living at the testator's death, of such of them as should not survive the testator —*Bent* v *Cullen* (Law Rep 6 Ch 235) observed upon *In re* MORGAN MORGAN *v* MORGAN - - - C A 222

2 —— *Conversion — Money directed to be Invested in Land—Devise of Real Estate—Trust to Re invest in Land*] Money arising from the sale, under a power, of lands in Staffordshire forming part of the C settled estates, was held upon trust to invest it in lands in England or Wales, to be settled upon the limitations of the C settlement. Under that settlement C was tenant for life, with remainder to his first and other sons successively in tail male, with remainder to himself in fee He died without issue, leaving a will by which he gave all his lands in Staffordshire to trustees upon trust for the benefit of one family, and gave all his real and personal estate not otherwise disposed of to trustees for another family —*Held*, by Kekewich, J, that the money went to the persons entitled to the Staffordshire lands —*Held* by the Court of Appeal, that the moneys, being impressed with a trust to invest in land, were to be treated as land and would pass under a devise of land Observations of Jessel, M R, in *Chandler* v *Pocock* (15 Ch D 491) considered But *held* that, as under the trust the money might have been invested anywhere in England, it would not pass under a devise of lands in Staffordshire —*Held*, therefore, that it passed under the residuary devise of real estate *In re* DUKE OF CLEVELAND'S SETTLED ESTATES [C A 244

3 —— *Forfeiture on Alienation—Life Interest —Assignment, or Attempted Assignment—Literal Meaning of Document not in conformity with real Intention of Parties*] By a will a fund was bequeathed in trust for one for life, with a gift over in case he should "assign, charge or incumber, or attempt or affect to assign, charge or incumber" his interest in the income On the occasion of a loan to him, he signed in favour of the lender a document which amounted in terms to an equitable assignment of his interest in the income Notice of the document was not given to the trustees of the will and it was subsequently destroyed by the lender It was proved that as between the tenant for life and the lender the document was not intended as a charge or assignment, and that it would have been a fraud on the bargain between them so to use it —*Held*, on the